Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SMITHFIELD FOODS, INC.,
SMITHFIELD PACKING COMPANY, INC., AND
GWALTNEY OF SMITHFIELD, LTD.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit properly held—in conflict with *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 61 (1987), and the intent of Congress—that the Clean Water Act permits the United States to bring a penalty action after a State—the primary regulatory authority under the statute—has agreed "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action."

2. Whether the Fourth Circuit properly held—in conflict with the First and Eighth Circuits—that state law must mimic federal law to be regarded as "comparable" under the Clean Water Act, so that a state enforcement action precludes a federal penalty action for the same violations.

3. Whether the Fourth Circuit properly held—in conflict with the D.C., Fifth, Sixth, Ninth, and Tenth Circuits—that petitioners had fair notice that they were violating the Clean Water Act where the State—the primary regulatory authority under the statute—specifically assured petitioners that they would be in compliance with a state limit not regulated by federal law by taking certain corrective action, and where EPA had notice of such assurances but waited five years before filing an action for alleged violations of that limit, by which time substantial penalties had accrued.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties that appeared in the Fourth Circuit. Smithfield Packing Company, Inc. and Gwaltney of Smithfield, Ltd. are wholly-owned subsidiaries of Smithfield Foods, Inc. Smithfield Foods, Inc. is a publicly held corporation and has no parent corporation. No publicly held entity owns 10% or more of Smithfield Foods, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	3
STATEMENT OF THE CASE	4
A. State Enforcement Action	5
B. Federal Overfile Action	9
REASONS FOR GRANTING THE WRIT	12
I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GWALTNEY* AND SECTION 510 OF THE CWA ON THE DISCRETION RESERVED TO THE STATES TO ENFORCE MORE STRINGENT ENVIRONMENTAL STANDARDS THAN THOSE IMPOSED BY FEDERAL LAW	12

TABLE OF CONTENTS—Continued

Page

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS ON THE PRECLUSIVE EFFECT OF SECTION 309(g)(6)(A)(ii) OF THE CWA. 17

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS ON THE NOTICE REQUIRED BEFORE A PARTY MAY BE PENALIZED FOR VIOLATING REGULATORY REQUIREMENTS 24

CONCLUSION 29

APPENDICES

Appendix A:

Opinion of the United States Court of Appeals for the Fourth Circuit (September 14, 1999) 1a

Appendix B:

Opinion of the United States District Court for the Eastern District of Virginia (August 8, 1997) 29a

Appendix C:

Opinion of the United States District Court for the Eastern District of Virginia (May 30, 1997) 63a

TABLE OF CONTENTS—Continued

Page

Appendix D:

Order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and rehearing en banc (January 6, 2000) 114a

Appendix E:

Order granting extension of time to file petition for a writ of certiorari (March 27, 2000) 116a

Appendix F:

Statutory provisions involved 117a

TABLE OF AUTHORITIES

Page

CASES:

American Paper Inst., Inc., v. *EPA*, 890 F.2d 869 (7th Cir. 1989) 13
Aminoil U.S.A., Inc. v. *California State Water Resources Control Bd.*, 674 F.2d 1227 (9th Cir. 1982) 16
Arkansas v. *Oklahoma*, 503 U.S. 91 (1992) 16
Arkansas Wildlife Fed'n v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995) 20,21,22,23,24
Boise Cascade Corp. v. *EPA*, 942 F.2d 1427 (9th Cir. 1991) 13
Braxton v. *United States*, 500 U.S. 344 (1991) 18
Citizens for a Better Env't – Cal. v. *Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir. 1996), *cert. denied*, 519 U.S. 1101 (1997) 24
Diamond Roofing Co. v. *Occupational Safety & Health Rev. Comm'n*, 528 F.2d 645 (5th Cir. 1976) 28
Diebold, Inc. v. *Marshall*, 585 F.2d 1327 (6th Cir. 1978) 29
District of Columbia v. *Schramm*, 631 F.2d 854 (D.C. Cir. 1980) 17
Friends of Santa Fe County v. *LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995) 25
General Elec. Co. v. *EPA*, 53 F.3d 1324 (D.C. Cir. 1995) 26,27
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 26
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

CASES:

Harmon Indus., Inc. v. *Browner*, 191 F.3d 894 (8th Cir. 1999) 17
Jones v. *City of Lakeland*, 175 F.3d 410 (6th Cir. 1999), *rehearing en banc granted*, 204 F.3d 680 (July 29, 1999) 23
Kent Nowlin Constr. Co. v. *Occupational Safety & Health Review Comm'n*, 593 F.2d 368 (10th Cir. 1979) 27,28
Lloyd C. Lockrem, Inc. v. *United States*, 609 F.2d 940 (9th Cir. 1979) 27,28
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 26
New York Coastal Fishermen's Ass'n v. *New York City Dep't of Sanitation*, 772 F. Supp. 162 (S.D.N.Y. 1991) 25
North & South Rivers Watershed Ass'n v. *Town of Scituate*, 949 F.2d 552 (1st Cir. 1991) 20,21,22,24
Old Timer, Inc. v. *Blackhawk-Central City Sanitation Dist.*, 51 F. Supp. 2d 1109 (D. Colo. 1999) 25
Saboe v. *Oregon*, 819 F. Supp. 914 (D. Or. 1993) 16
Sierra Club v. *Colorado Ref. Co.*, 852 F. Supp. 1476 (D. Colo. 1994) 25
Southern Ohio Coal Co. v. *Office of Surface Mining, Reclamation & Enforcement, Dep't of Interior*, 20 F.3d 1418 (6th Cir.), *cert. denied*, 513 U.S. 927 (1994) 16

TABLE OF AUTHORITIES—Continued

Page

CASES:

Supporters to Oppose Pollution, Inc. v. *The Heritage Group*, 973 F.2d 1320 (7th Cir. 1992) 16
United States v. *AM General Corp.*, 34 F.3d 472 (7th Cir. 1994) 29
United States v. *District of Columbia*, 933 F. Supp. 42 (D.D.C. 1996) 16
United States v. *Homestake Mining Co.*, 595 F.2d 421 (8th Cir. 1979) 21
Wheeler v. *Barrera*, 417 U.S. 402 (1974) 20

CONSTITUTION:

U.S. Const. amend. V 2

STATUTES:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 2
33 U.S.C. § 1251(b) 5,13
33 U.S.C. § 1319(d) 3,11,12
33 U.S.C. § 1319(g) 3,18
33 U.S.C. § 1319(g)(2) 19
33 U.S.C. § 1319(g)(6)(A) 3,17
33 U.S.C. § 1319(g)(6)(A)(ii) 10,17,18,19
33 U.S.C. § 1342(b) 5
33 U.S.C. § 1370 2,4,11
33 U.S.C. § 1370(1)(A) 14
42 U.S.C. § 6926(b) 17

TABLE OF AUTHORITIES—Continued

	Page
STATUTES:	
Va. Code § 10.1-1182	19
Va. Code § 10.1-1186(5)	19
Va. Code § 10.1-1186(10)	19
Va. Code § 62.1-44.15(8c)	19
Va. Code § 62.1-44.15(8d)	19
Va. Code § 62.1-44.32	19
Va. Admin. Code tit. 9, § 25-31-910(B)(3)	20
Va. Admin. Code tit. 9, § 25-40-10, *et seq*	5
RULE:	
S. Ct. Rule 10(a)	18
OTHER:	
Heather L. Clauson, *How Far Should the Bar on Citizen Suits Extend Under § 309 of the Clean Water Act?*, 27 Envtl. Law (1997)	25
EPA, *Memorandum of Understanding Regarding Permit and Enforcement Programs Between the State Water Control Board and the Regional Administrator, Region III Environmental Protection Agency* (1975)	5
EPA, *Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act* (1993)	20
Julia A. Glazer, *The Clean Water Act Enforcement Provision: What Constitutes Diligent Enforcement Under Comparable State Law*, 23 No. Ky. L. Rev. 129 (1995)	25

TABLE OF AUTHORITIES—Continued

Page

OTHER:

Arne R. Leonard, *When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?*, 35 Nat. Res. J. 555 (1995) 25

Steven Russo, *States, Citizens, and the Clean Water Act: State Administrative Enforcement and the Diligent Prosecution Defense*, 4 N.Y.U. Envtl. L. J. 211 (1995) 25

Webster's Third New International Dictionary (1986) 20

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Smithfield Foods, Inc., Smithfield Packing Company, Inc., and Gwaltney of Smithfield, Ltd. (collectively, "Smithfield"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 191 F.3d 516 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Eastern District of Virginia on liability issues is reported at 965 F. Supp. 769 and reproduced at App. 63a. The opinion of the District

Court on penalty issues is reported at 972 F. Supp. 338 and reproduced at App. 29a.

JURISDICTION

The judgment of the Fourth Circuit was entered on September 14, 1999. App. 1a. The Fourth Circuit denied a timely petition for rehearing and rehearing en banc on January 6, 2000. App. 114a. On March 27, 2000, the Chief Justiee entered an Order extending the time for filing a petition for certiorari to and including May 5, 2000. App. 116a. The jurisdiction of the Fourth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Section 510 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1370, provides in pertinent part:

> Except as expressly provided in this [Act], nothing in this [Act] shall (1) preclude or deny the right of any State * * * to adopt or enforce (A) any standard or limitation respecting discharges of pollutants * * *; except that if an effluent limitation * * * is in effect under this [Act], such State * * * may not adopt or enforce any effluent limitation * * * which is less stringent than the effluent limitation * * * under this [Act].

Section 309(g)(6)(A)(ii) of the CWA, 33 U.S.C. § 1319(g)(6)(A)(ii), provides in pertinent part:

[A]ny violation—

* * *

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to [Section 309(g) of the Act, 33 U.S.C. § 1319(g)]

* * *

shall not be the subject of a civil penalty action under [Section 309(d) of the Act, 33 U.S.C. § 1319(d)].

Sections 309(d), 309(g), and 510 are reproduced in full at App. 117a-124a.

INTRODUCTION

This case arises out of the imposition of a civil penalty—$12.6 million—that when entered was the largest ever assessed under the CWA. Yet the most significant aspect of this case is not the size of that penalty, but the policy dispute that arose between state and federal authorities over whether a penalty was appropriate at all. Smithfield was caught in the middle of that dispute. Under an agreement with Virginia regulatory authorities—charged with primary responsibility under the CWA to enforce the regulatory standards at issue—Smithfield invested millions of dollars to comply with a state limitation on an effluent constituent (phosphorous) not regulated by federal law, taking action it was otherwise under no obligation to take and that conferred a substantial benefit on the Commonwealth and its residents. Years later, however, Smithfield was blind-sided by federal authorities in this action seeking penalties for exceedences of the very limits that Virginia regulatory authorities—in order to secure Smithfield's agreement to enter into a multimillion dollar compliance plan—had assured Smithfield it need *not* meet.

In addition to concerns about the fundamental fairness of a regulatory regime that permits such a result, this case raises significant federalism concerns about the respective roles of the States and the federal government in administering one of the Nation's most important and far-reaching environmental laws. In enacting the CWA, Congress specifically sought to promote comity by giving the States primary authority to enforce the limits in the permits they issue under the Act, and the discretion to "adopt or enforce" environmental standards more stringent than those imposed by federal law. 33 U.S.C. § 1370. By bringing this overfile action for exceedences inherent in a state-approved compliance plan, EPA has "curtail[ed] considerably" the "discretion" of a primary regulatory authority "to enforce the Act in the public interest," *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987), and thereby upset Congress's intentions in enacting the CWA. The Fourth Circuit below not only sanctioned this result, but did so in a manner contrary to the decisions of this Court and other federal courts of appeal. The multiple conflicts engendered by the decision below concern matters of grave importance. This Court should grant review and resolve them here.

STATEMENT OF THE CASE

Smithfield operates two pork processing plants in Isle of Wight County, Virginia. Until recently, these plants discharged treated effluent into the Pagan River under permits issued by the Virginia State Water Control Board ("Board"). The Board is authorized by EPA to issue such permits under the CWA, *see* 33 U.S.C. § 1342(b), and has "primary" authority to enforce the effluent limitations they contain. *See id.* § 1251(b); EPA, *Memorandum of Understanding Regarding Permit and Enforcement Programs Between the State Water Control Board and the Regional Administrator, Region III EPA* 1 (1975). This case arises over a dispute

between federal and state authorities over enforcement of a state limit contained in Smithfield's permit.

A. State Enforcement Action.

1990 Permit and Special Order. In 1988, the Board promulgated regulations that, for the first time, limited the amount of phosphorous—a substance not regulated with respect to meat processors or the Pagan River under federal law—that could be discharged into Virginia waterways. *See* Va. Admin. Code tit. 9, § 25-40-10, *et seq*. Shortly thereafter, Smithfield filed an action in state court, arguing in part that the limit the Board sought to impose was not technologically achievable. Meanwhile, on January 4, 1990, Smithfield's existing permit was modified to include the phosphorous limit and a three-year compliance schedule requiring Smithfield to upgrade its wastewater treatment facilities to meet the limit. Smithfield promptly filed a challenge to the modified permit (the "1990 permit") with the Board on the same grounds raised in state court. If successful, Smithfield's administrative and judicial challenges could have prevented the Commonwealth from applying its new phosphorous limit not only to Smithfield but throughout Virginia.

Negotiations between the parties ensued. On March 21, 1990, Smithfield's administrative challenge was settled by means of a consent order (the "1990 Special Order"). Under that Order, the Board agreed to postpone commencement of the 1990 permit's compliance schedule in exchange for Smithfield's agreement to study a proposal that it reroute its wastewater to a treatment plant operated by the Hampton Roads Sanitation District ("HRSD")—something Smithfield was otherwise under no obligation to do. This solution would not only allow the Board to achieve the broader environmental objective of completely eliminating Smithfield's discharge of effluent into the Pagan River, but the resulting pipeline would also allow the Town of Smithfield

and other area residents to hook up to HRSD, removing their pollutants from the Pagan River as well. A copy of the 1990 Special Order was sent to EPA.

1991 Special Order. On May 9, 1991, the Board issued another order (the "1991 Special Order") which resolved Smithfield's judicial challenge to the state phosphorous standard. That Order required Smithfield to advise the Board no later than June 14, 1991 of its "commitment to connect to HRSD *or* to upgrade [its] facilities to comply with the * * * phosphorous standard." 4th Cir. J.A. 79 (emphasis added). The Order also required Smithfield—if it decided to connect to HRSD—to do so within three months of notification *by HRSD* that the connecting pipeline was available. If Smithfield elected *not* to connect to HRSD, the Order required it to submit, by August 15, 1991, a schedule for completing the facility upgrades necessary to comply with all effluent limitations. Pursuant to the Order, Smithfield dismissed its judicial challenge to the phosphorous standard. A copy of the 1991 Special Order was sent to EPA.

On June 7, 1991, Smithfield notified the Board of its decision to connect to HRSD. Thus, after eighteen months of negotiations, the Board obtained a commitment from Smithfield to *completely* eliminate its discharges into the Pagan River, with the further result that the Town of Smithfield and other area residents would also stop discharging their pollutants into the river by connecting to HRSD. This result ultimately benefited the environment and the people of Virginia more than continuing discharges in compliance with the new phosphorous limit would have—assuming that limit would have even survived Smithfield's legal challenges.

1992 Permit. In 1991, Smithfield's permit was due for routine reissuance. The Board prepared and submitted for EPA review and public comment a draft permit that carried forward the standards in the modified 1990 permit. To

ensure that the permit would be construed in a manner consistent with its settlement with the Board, Smithfield reminded the Board in writing on October 1, 1991, that the compliance dates in the draft permit could not be met "now that we have agreed to abandon plans to upgrade our existing facilities and tap onto HRSD when it becomes available," and requested that

> if [the] compliance dates and milestones [were] required in the proposed permit, some documentation or letter be provided by the State Water Control Board stating that alternate compliance will be maintained with Smithfield's agreement to connect to HRSD as soon as it becomes available regardless of the time frame in which this occurs. [4th Cir. J.A. 84 (emphasis added).]

On October 10, 1991, the Board assured Smithfield that it would be in compliance if it connected to HRSD pursuant to the agreement and that it was *not* required to meet the phosphorous limit in the permit during the interim:

> The compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations. *Any special order agreements relative to compliance * * * that have been approved by the Board take precedence over the VPDES Permit.* [*Id.* 86 (emphasis added).]

EPA received a copy of this written response—just as it had received copies of the Special Orders reflecting the parties' settlement agreement as to how Smithfield would meet the phosphorous limit—and attached the copy to its approval of the new permit kept in its files.

On January 3, 1992, the Board issued the new permit (the "1992 permit") to Smithfield. Although the 1992 permit maintained the new phosphorous limit, it was clear from the

1991 Special Order and the October 1991 exchange between the parties that the Board would consider Smithfield in compliance so long as it connected to HRSD within three months of availability. The 1991 Special Order required Smithfield to upgrade its own treatment facilities to comply only if it did *not* connect to HRSD, and the October 1991 exchange—provided to EPA—confirmed that the Order "[took] precedence" over the permit. *Id.*[1]

Smithfield's Corrective Action. After several delays not attributable to Smithfield, HRSD eventually completed construction of the pipeline, and by August 1997, Smithfield had completely ceased discharging effluent into the Pagan River and was routing all its wastewater to HRSD. In connecting to HRSD, Smithfield spent over $2.7 million upgrading its own facilities so that effluents could be properly pretreated before entering the HRSD system, plus some $300,000 for a pump station to serve the Town of Smithfield so that its wastewater could be routed to HRSD. Smithfield's annual user fees to HRSD for treatment are expected to total more than $2 million. Thus, Smithfield has and will continue to spend millions of dollars in cooperating with the Board to

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[1] The 1992 Permit also established new limits for ammonia, cyanide, and CBOD, requiring compliance by May 13, 1994. 4th Cir. J.A. 165. In February 1992, Smithfield advised the Board that it planned to comply with these limits by connecting to HRSD, and the Board confirmed that Smithfield's plan was acceptable. *Id.* Subsequently, in November 1994, the 1991 Special Order was amended to provide that Smithfield "may achieve compliance with the [effluent limitations for CBOD, total cyanide, and ammonia] by connecting to the HRSD system." *Id.* 166. This amendment thus exempted Smithfield from complying with the limitations for these effluents pending connection to HRSD, just as the 1991 Special Order itself provided that if Smithfield connected to HRSD it would not be required otherwise to comply with the limitation on phosphorous.

achieve the goal of ending Smithfield's discharges into the Pagan River.[2]

B. Federal Overfile Action.

Just as Smithfield was about to connect to HRSD, the United States brought this action against it for failing to meet the very state law limits the Board had assured Smithfield it was *not* required to attain during the interim. Although EPA had ample information since 1991 that made clear that—as a result of the compliance plan entered into as part of the Board's enforcement action—Smithfield was not required to comply with the phosphorous limit pending connection to HRSD, EPA never objected and did not bring this action until December 16, 1996, more than five years later.[3]

Liability Phase. On March 10, 1997, well before discovery had concluded, the United States moved for partial summary judgment on liability. App 63a. The District Court granted that motion on May 30, 1997, concluding that Smithfield was liable because the 1992 Permit "did not incorporate, nor was it conditioned, revised, or superseded by, the Board's Special Orders issued prior to the filing of this action." App. 82a. The court further ruled that, in any event, the 1990 and 1991 Special Orders were not relevant because EPA had never affirmatively agreed to be bound by

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[2] Smithfield's commitment to connect to HRSD was essential to enable HRSD to build the pipeline and upgrade its own facilities. To obtain funding for the project, HRSD applied to the Board for assistance from the Virginia Revolving Loan Fund, which is funded largely by EPA. EPA undertook a close review of the project in connection with the Commonwealth's approval of over $50 million in funding for HRSD to upgrade its facilities to implement the 1991 Special Order.

[3] The Commonwealth declined the invitation of the United States to join the federal suit and filed its own action in Isle of Wight Circuit Court on August 30, 1996, seeking injunctive relief and civil penalties against Smithfield for exceeding certain limitations for substances other than phosphorous, and penalties for a rogue employee's destruction of records.

them—even though it had received notice of and had never objected to them—and Smithfield had never taken the formal steps necessary to obtain a permit modification. App. 91a, 100a-101a.

The District Court also held that EPA's action was not barred by Section 309(g)(6)(A)(ii) of the CWA. That provision precludes a federal penalty action where a state agency has "commenced and is diligently prosecuting an action under State law comparable to [Section 309(g)]," 33 U.S.C. § 1319(g)(6)(A)(ii), which in turn provides for federal administrative penalty actions. Narrowly construing that provision, the court concluded that Virginia law was not comparable to Section 309(g) because at the time the Board commenced its action it could impose administrative penalties only with the consent of a violator, and because Virginia law did not provide for public participation rights identical to those found in Section 309(g). App. 104a-112a.

The court further rejected Smithfield's argument that the action was barred by Section 510 of the CWA, which provides that "nothing in [this Act] shall * * * preclude or deny the right of any State * * * to adopt or enforce" state standards more stringent than those in effect under the Act, such as Virginia's phosphorous limit. 33 U.S.C. § 1370. In so doing, the court dismissed out of hand Smithfield's argument—based on this Court's decision in *Gwaltney*, 484 U.S. at 61—that the authority of Virginia to enforce its own, more stringent phosphorus limit as it sees fit includes the discretion to forgo penalties in order to achieve a greater environmental goal—in this case, the complete elimination of discharges into the Pagan River. App. 112a-113a.

Penalty Phase. The case then proceeded to the penalty phase. The CWA authorizes the imposition of penalties for each day that a violation occurs. 33 U.S.C. § 1319(d). The District Court found Smithfield liable for violating both daily

and monthly limits. While acknowledging federal circuit court precedent rejecting such an approach as double counting, the court nevertheless counted each violation of a monthly limit as a violation for every day of that month, and also counted as separate days of violation exceedances of daily limits in months Smithfield had also exceeded the monthly limit for the same substance. App. 32a-33a. Violations of the state phosphorous limit accounted for 86% of the effluent limit violations found against Smithfield.

In assessing a penalty under the CWA, a court is required to consider, among other things, "the economic benefit (if any) resulting from the violation," "any good-faith efforts to comply with the applicable requirements," and "such other matters as justice may require." 33 U.S.C. § 1319(d). In determining economic benefit, the District Court refused to factor in the millions of dollars Smithfield spent to comply with the permit by connecting to HRSD, and refused to give Smithfield credit for good faith efforts to comply with the applicable requirements because Smithfield's understanding of what those requirements were—even though confirmed by the Board—turned out to be wrong, at least in the court's view. App. 49a n.16, 52a-54a.

The court set the penalty at $12.6 million. App. 62a. Thus, in a case in which the court made no finding of bad faith—and in which the penalized party was caught in the middle of a dispute between federal and state regulating authorities—the District Court entered what was at the time the largest civil penalty in the history of the CWA.

Fourth Circuit Proceedings. The Fourth Circuit affirmed, save for a mathematical error that the District Court had concluded was insignificant. App. 25a-26a. The court set out the parties' arguments on liability at length. But instead of independently analyzing those arguments, it simply adopted—with virtually no explanation—the District Court's

legal conclusions. App. 11a-16a. Thus, the Fourth Circuit "concur[red]" that "neither the Supreme Court's ruling in *Gwaltney*, nor § 510 of the CWA preclude the EPA from bringing this enforcement action," and that "Virginia's enforcement scheme is not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent penalty action." App. 15a-16a. As for the penalty issues, the Fourth Circuit rejected Smithfield's arguments that the District Court impermissibly "double counted" violations, failed to give Smithfield credit for its hook-up costs and user fees in calculating economic benefit, and failed to take into account Smithfield's good faith efforts to comply by connecting to HRSD. App. 17a-20a, 22a-28a.

Smithfield timely filed a petition for rehearing and rehearing en banc, which the Fourth Circuit denied. App. 114a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GWALTNEY* AND SECTION 510 OF THE CWA ON THE DISCRETION RESERVED TO THE STATES TO ENFORCE MORE STRINGENT ENVIRONMENTAL STANDARDS THAN THOSE IMPOSED BY FEDERAL LAW.

In enacting the CWA, Congress declared its policy "to recognize, preserve, and protect the *primary* responsibilities and rights of *States* to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b) (emphases added). To this end, Congress not only gave the States primary authority to enforce the limits in the permits they issue under the Act, *see id.*,[4] but specifically reserved to the States in Section 510 of

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[4] *See also Gwaltney*, 484 U.S. at 60 (citing legislative history indicating that Congress "intend[ed] the great volume of enforcement actions

the CWA the authority to "adopt *or enforce*" effluent limitations and standards more stringent than those imposed by federal law. *Id.* § 1370(1)(A) (emphasis added). As this Court's decision in *Gwaltney* underscores, this express congressional reservation of authority would be meaningless if States could not enforce their own, more stringent environmental standards in the manner they deem most beneficial to the public interest *without* interference from EPA.

In *Gwaltney*, the Court made clear that a penalty action brought under the CWA should not be permitted to undermine the efforts of the primary regulatory authority to achieve broad remedial action. There, the Court held that the CWA's "citizen suit" provision then in effect did not confer jurisdiction over suits for past violations, emphasizing that any other interpretation would create a "disturbing anomaly" and a "danger," due to the "potentially intrusive" nature of a penalty action where the primary regulatory authority has decided "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." 484 U.S. at 60-61. As the Court explained, if such a policy decision by the primary regulatory authority could be second-guessed by another enforcer "months or years later, in order to seek the civil penalties that the [primary authority] chose

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[under the CWA] be brought by the State"); *Boise Cascade Corp.* v. *EPA*, 942 F.2d 1427, 1433 (9th Cir. 1991) ("purpose of the Act [is] to afford states as much control as possible over implementation and enforcement of pollution controls"); *American Paper Inst., Inc.*, v. *EPA*, 890 F.2d 869, 873 (7th Cir. 1989) ("legislative history [of the CWA] is replete with statements recognizing that the states should play the leading role in implementing the NPDES system") (footnote omitted).

to forgo, then [its] discretion to enforce the Act in the public interest would be curtailed considerably." *Id.*[5]

In exercising its primary enforcement authority under Section 510 in this case, the Commonwealth was attempting to achieve—and did achieve—precisely the type of broad remedial action contemplated in *Gwaltney*. The Board had no authority to require Smithfield to connect to HRSD and thus completely eliminate its discharges into the Pagan River. In addition, it was faced with Smithfield's legal challenges to the phosphorous limit, which might well have succeeded and prevented the Board from enforcing the limit *at all*. By agreeing that Smithfield would not be required to meet the phosphorous and other state limits until it took "extreme corrective action" that it "otherwise would not be obliged to take," the Board was able to achieve far-reaching, long-term goals—the complete elimination of Smithfield's discharges into the Pagan River (not to mention the removal of the Town of Smithfield's pollutants), as well as the preservation of the phosphorous limit—results undeniably "in the public interest."

Under the principles embodied in Section 510 of the CWA and outlined in *Gwaltney*, EPA should not have been permitted to bring this enforcement action and seriously undermine the Board's ability to achieve the same result in future cases. Without explanation, however, the Fourth Circuit held that "neither the Supreme Court's ruling in *Gwaltney*, nor § 510 of the CWA preclude the EPA from bringing this enforcement action." App. 16a. But if the United States is allowed to seek penalties in situations like this one—where the limits involved are imposed solely as a matter of state

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[5] Although the penalty action at issue in *Gwaltney* threatened to undermine the discretion of federal authorities, the Court expressly recognized that "[t]he same might be said of the discretion of state enforcement authorities." 484 U.S. at 61 (emphasis added).

law—States will not be able to exercise the authority explicitly reserved to them by Congress in Section 510 to "adopt or enforce" more stringent environmental standards in the manner *they* believe best serves the public interest. Because a regulated entity has little incentive to work with a State to achieve a costly environmental goal if federal authorities can step in "months or years later, in order to seek the civil penalties the [State] chose to forgo," the result is to impermissibly curtail the discretion explicitly reserved to the States in Section 510. 484 U.S. at 61.[6] *Gwaltney* specifically contemplates and condemns this very result, and the Fourth Circuit's contrary decision merits this Court's review.[7]

This case in fact presents an even more "disturbing anomaly" than the situation in *Gwaltney*. *Id.* at 60. Principles of comity and federalism are expressly embodied in the CWA. *See supra* at 12-13 & n.4. *See also Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government"); *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement, Dep't of Interior*, 20 F.3d 1418, 1427 (6th Cir.) ("the CWA sets up a system of 'cooperative federalism'"), *cert. denied*, 513 U.S. 927 (1994); *Aminoil*

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[6] When it acts as the primary enforcer of the CWA, the United States often makes "a conscious decision not to seek civil penalties" in order to achieve broader goals. *United States* v. *District of Columbia*, 933 F. Supp. 42, 51 (D.D.C. 1996). The States, when acting as the primary enforcer, should be granted the same discretion and, indeed, Section 510 of the CWA grants it to them.

[7] The clear import of *Gwaltney* has not been lost on the lower courts. *See, e.g., Supporters to Oppose Pollution, Inc.* v. *The Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) ("An Administrator unable to make concessions is unable to obtain them."); *Saboe* v. *Oregon*, 819 F. Supp. 914, 918 (D. Or. 1993) ("It is doubtful that an alleged violator would fully cooperate with [the state] to resolve [potential violations] if they [sic] lacked assurance that the same violation would not be the subject of a [separate] suit in federal court at some later time.").

U.S.A., Inc. v. *California State Water Resources Control Bd.*, 674 F.2d 1227, 1229 (9th Cir. 1982) (CWA creates a "cooperative federal-state scheme for the control of water pollution" and a "delicate partnership between state and federal agencies") (quotations omitted); *District of Columbia* v. *Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980) (noting "strong current of federalism in the Clean Water Act"). Allowing federal authorities to undermine a State's efforts to enforce its own environmental standards pursuant to an express reservation of authority upsets the balance of power the Act seeks to maintain.

The Eighth Circuit was mindful of such considerations in *Harmon Industries, Inc.* v. *Browner*, 191 F.3d 894 (8th Cir. 1999), where the court recently refused to allow a "second enforcement action" by EPA under the Resource Conservation and Recovery Act ("RCRA") "simply [to] fill the perceived gaps it sees in a state's enforcement action." *Id.* at 901. If a second enforcement action were permitted, the court explained, "[c]ompanies that reach an agreement through negotiations with a state authorized by the EPA to act in its place may find the agreement undermined by a later separate enforcement action by the EPA * * *. Such a potential schism runs afoul of the principles of comity and federalism so clearly embedded in the text and history of RCRA." *Id.* at 902.[8] In reaching a result contrary to *Gwalt-*

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[8] Although the text of RCRA differs from the CWA in authorizing the States to bring an enforcement action in lieu of the United States, see 42 U.S.C. § 6926(b); *Harmon*, 191 F.3d at 899, the rationale supporting the Eighth Circuit's decision applies here. Congress intended the States to have primary enforcement authority over the programs they administer under both Acts. *See supra* at 12-13 & n.4; *Harmon*, 191 F.3d at 901. And although the United States may bring an action "to enforce any provision" of the CWA, 33 U.S.C. § 1319(g)(6)(A), no such action may be brought where, as here, "a State has commenced and is diligently prosecuting an action under a State law comparable to [federal law]." *Id.* § 1319(g)(6)(A)(ii). Moreover, as *Gwaltney* teaches, the authority to

ney, the Fourth Circuit below—by contrast—clearly lost sight of the same principles embedded in the CWA.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS ON THE PRECLUSIVE EFFECT OF SECTION 309(g)(6)(A)(ii) OF THE CWA.

The Fourth Circuit's decision also conflicts with the decisions of other federal circuits on the preclusive effect of Section 309(g)(6)(A)(ii) of the CWA, providing another basis for certiorari. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose" for which this Court grants certiorari "is to resolve conflicts among the United States courts of appeals").

Section 309(g)(6)(A)(ii) precludes a federal penalty action for violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law *comparable* to [Section 309(g) of the Act]," 33 U.S.C. § 1319(g)(6)(A)(ii) (emphasis added), which provides for federal administrative penalty actions. *See id.* § 1319(g). Because Virginia law provides a system of enforcement, penalties, and public participation rights fully "comparable" to that of Section 309(g), EPA's overfile action was precluded by Section 309(g)(6)(A)(ii).

At the time the Board commenced its action against Smithfield, it had the authority to bring a civil action in state court seeking up to $25,000 per day for violations of state permits, *and* the authority to impose administrative penalties in the same amount, subject to consent. *See* Va. Code §§ 62.1-

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"overfile" under the CWA does not include the authority to undermine the state enforcement program by seeking penalties a State has expressly eschewed in exchange for voluntary compliance with a particular remedial plan.

44.15(8c), (8d); *id.* § 62.1-44.32. *Compare* 33 U.S.C. § 1319(g)(2) (administrative penalties of up to $10,000 per day and $125,000 total). Because the threat of judicial enforcement provided a real incentive to enter into consent orders imposing administrative penalties, these two provisions worked in tandem to achieve the same ends as Section 309(g). Moreover, in April 1996—while the Board was still conducting its administrative action and before EPA filed its penalty action—Virginia law was amended to provide for the imposition of administrative penalties *without* consent. *See* Va. Code §§ 10.1-1182, 10.1-1186(5), (10).[9]

In addition, at all relevant times during the Board's enforcement action against Smithfield, Virginia law—like Section 309(g)—provided significant opportunities for public participation by requiring that public notice be given of all proposed enforcement actions and special orders, that the public be allowed to comment on such proceedings, and that the Board consider all comments before taking final action. *See* Va. Admin. Code tit. 9, § 25-31-910(B)(3).

The Fourth Circuit nonetheless held that "Virginia's enforcement scheme [was] not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent

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[9] The Court of Appeals below rejected Smithfield's argument that comparability should be gauged at the time the federal penalty action is filed. *See* App. 13a n.2. But determining comparability at that point is more consistent with the purposes of Section 309(g)(6)(A)(ii), not to mention its text. *See* 33 U.S.C. § 1319(g)(6)(A)(ii) (federal action precluded where "State has commenced and *is diligently prosecuting* an action under a State law *comparable* to [Section 309(g) of the Act]") (emphases added). In any event, the state statutory scheme that existed when Virginia initiated its enforcement action against Smithfield plainly enabled the Commonwealth to promote the goals of the CWA—as is evident from the result secured by the Board in this case—and, thus, was sufficiently comparable to trigger preclusion under the approach taken by other circuits. *See infra* at 19-23.

penalty action." App. 15a-16a. In so holding, the Fourth Circuit effectively embraced EPA's position that state law must "mimic" federal law to trigger preclusion. *See* EPA, *Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act* 4 (1993) ("state law must essentially mimic the substance of the federal provision"), cited in U.S. Ct. App. Br. at 33. That approach not only conflicts with the plain meaning of the statute, *see Webster's Third New International Dictionary* 461 (1986) ("comparable" means "having *enough* like characteristics or qualities to make comparison appropriate," or "permitting or inviting comparison *often in one or two salient points only*") (emphases added),[10] but with the decisions of other circuits categorically rejecting such a restrictive application of Section 309(g). *See, e.g., Arkansas Wildlife Fed'n* v. *ICI Americas, Inc.*, 29 F.3d 376, 381 (8th Cir. 1994) (state law need not be "identical" to federal law), *cert. denied*, 513 U.S. 1147 (1995); *North & South Rivers Watershed Ass'n,* v. *Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991) (rejecting a "narrow reading" of the provision).

In stark contrast to the myopic inquiry conducted by the Fourth Circuit below, the First and Eighth Circuits have assessed comparability from an entirely different perspective, looking to the "overall [state] regulatory scheme," and considering whether state and federal law have the "same overall enforcement goals." *Arkansas Wildlife Fed'n*, 29 F.3d at 381; *accord Town of Scituate*, 949 F.2d at 556 (looking to whether "overall scheme of the two acts [*i.e.*, state and federal] is aimed at correcting the same violations, thereby achieving the same goals"). Quite unlike the Fourth Circuit, these courts have rejected "a narrow reading of section 309(g)(6)(A), which turns on the logistical happenstance of statutory drafting," and "ignores [the] important

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[10] This Court itself has recognized that "'[c]omparable' * * * does not mean 'identical.'" *Wheeler* v. *Barrera*, 417 U.S. 402, 420 (1974).

considerations" underlying the CWA. 949 F.2d at 556. This approach squares with the plain meaning of "comparable," *supra* at 19, not to mention the "vigorous federalism underlying the Clean Water Act." *United States* v. *Homestake Mining Co.*, 595 F.2d 421, 429 (8th Cir. 1979).

In *Town of Scituate*, the state enforcement agency issued an administrative compliance order under a state statutory provision that did not provide for the assessment of penalties. In rejecting the contention that the provision under which the order was issued was not comparable to Section 309(g)(6)(A)(ii) because it did not provide for penalties, the First Circuit noted that another provision in the same statutory scheme did so provide, and further observed that the two provisions were "two coordinate parts [which] are cogs in the same statutory scheme implemented by the State for the protection of its waterways." 949 F.2d at 556. Accordingly, the court concluded, "[i]t is enough that the [state] statutory scheme, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals." *Id.* The court similarly rejected the contention that the state regime did not provide public participation rights comparable to those found in Section 309(g), holding that "[s]o long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act," regardless of whether the state scheme is "identical to the Federal Act." *Id.* at 556 n.7.

Significantly, in adopting this approach, the First Circuit specifically recognized that "[d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well under-

way do not further [the CWA's] goal" of restoring and maintaining the environmental integrity of the Nation's waterways. *Id.* at 556. Instead, such actions can be "*impediments* to environmental remedy efforts." *Id.* (emphasis added). That is precisely what *Gwaltney* teaches, yet the Fourth Circuit failed to heed this lesson.

Arkansas Wildlife Federation is to the same effect. There, the Eighth Circuit rejected the contention that the state law at issue did not provide public participation rights comparable to those found in Section 309(g). Expressly agreeing with the reasoning of the First Circuit in *Town of Scituate*, the court held that "even if the state law does not contain *precisely* the same public notice and comment provisions as those found in the [CWA]," the "comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the State is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests." 29 F.3d at 381 (emphasis added). In these circumstances, the court held, "the state statute should be presumed comparable unless the facts of the specific case demonstrate" to the contrary. *Id.* at 382.[11]

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[11] The Fourth Circuit's decision also conflicts with *Jones* v. *City of Lakeland*, 175 F.3d 410 (6th Cir. 1999). Expressly relying on *Town of Scituate* and *Arkansas Wildlife Federation*, the Sixth Circuit in *Jones* followed the same approach as the First and Eighth Circuits. *See* 175 F.3d at 415-417. There, the court held that the state law at issue contained penalty and public participation provisions comparable to Section 309(g) where federal and state law shared the same "overarching goals" and "significant commonalities." *Id.* at 415. Notably—in rejecting "a narrow, exacting interpretation of the word 'comparable' that requires one-for-one equivalency"—the Sixth Circuit specifically recognized that the bar on penalty actions "avoid[s] presenting an offending party with *inconsistent* obligations imposed by a federal court, as a result of a

Under the approach of the First and Eighth Circuits, Virginia's "overall regulatory scheme" is "sufficiently comparable" to the federal program under Section 309(g) to preclude EPA's overfile action, "even if the [Virginia] law does not contain precisely the same * * * provisions as those found in the federal CWA." *Id.* At the time EPA brought this overfile action—and the Board was still conducting *its* enforcement action—Virginia law provided for the imposition of administrative penalties without the consent of the violator. Even at the time the Board commenced its action, Virginia's overall statutory scheme contained "penalty assessment provisions comparable to the Federal Act * * * [and] the overall scheme of the two acts [was] aimed at correcting the same violations, thereby achieving the same goals." 949 F.2d at 556. In particular, the judicial and administrative penalty provisions in effect were "two coordinate * * * cogs in the same statutory scheme implemented by the State for the protection of [Virginia's] waterways." *Id.* Moreover, by requiring that public notice be given of all proposed enforcement actions and special orders, that the public be allowed to comment on such proceedings, and that the Board consider all comments before taking final action, Virginia guarantees interested citizens a "meaningful opportunity to participate at significant stages of the decision-making process," 29 F.3d at 381, and "adequately safeguards their legitimate substantive interests." *Id.*; *accord* 949 F.2d at 556 n.7. Finally, any doubt as to whether the Virginia scheme advances the same important interests as the CWA is answered by the extreme corrective action that the Board

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[penalty] action, and by another court or administrative agency, as a result of an independent * * * state agency action." *Id.* (emphasis added). In failing to apply the bar here, the Fourth Circuit subjected Smithfield to precisely the sort of "inconsistent obligations" Congress sought to avoid. The Sixth Circuit has granted rehearing en banc in *Jones*, *see* 204 F.3d 680 (1999), underscoring the importance of this issue.

secured in this case—the complete elimination of Smithfield's discharges into the Pagan River.

The Fourth Circuit's contrary decision deepens an existing conflict on the scope of Section 309(g)(6)(A)(ii). In contrast to the First and Eighth Circuits, the Ninth Circuit—like the Fourth Circuit below—has given that provision an extremely narrow reading. *See Citizens for a Better Env't-Cal.* v. *Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir. 1996), *cert. denied*, 519 U.S. 1101 (1997). Expressly rejecting the First Circuit's reasoning in *Town of Scituate*, the Ninth Circuit held in *Union Oil* that Section 309(g)(6)(A)(ii) does not apply where the provision under which administrative action is taken does not provide for penalties. *Id.* at 1117-18. This conflict has further manifested itself among district courts in other circuits.[12] Commentators have highlighted the conflict and have expressed the need for its resolution.[13] This case

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[12] *Compare Old Timer, Inc.* v. *Blackhawk-Central City Sanitation Dist.*, 51 F. Supp. 2d 1109, 1113-14 (D. Colo. 1999) (citizen suit precluded only when state has commenced an administrative penalty action against a polluter); *Friends of Santa Fe County* v. *LAC Minerals, Inc.*, 892 F. Supp. 1333, 1347 (D.N.M. 1995) ("section [309(g)(6)(A)(ii)] is narrowly drawn; its preclusionary effect applies only when * * * a state is in the process of collecting or has collected administrative penalties"), *with Sierra Club* v. *Colorado Ref. Co.*, 852 F. Supp. 1476, 1484-85 (D. Colo. 1994) (rejecting argument that state must actually seek penalties before citizen suits are precluded); *New York Coastal Fishermen's Ass'n* v. *New York City Dep't of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991) ("it cannot be reasonably argued that only when a penalty is actually imposed that a citizen suit is precluded"; such a reading is "an overly technical interpretation" that would "unnecessarily undermine state and local enforcement efforts").

[13] *See, e.g.*, Heather L. Clauson, *How Far Should the Bar on Citizen Suits Extend Under § 309 of the Clean Water Act?*, 27 Envtl. Law 967, 968 (1997) ("conflict among the circuits has resulted which needs to be resolved"); Julia A. Glazer, *The Clean Water Act Enforcement Provision: What Constitutes Diligent Enforcement Under Comparable State Law*, 23 No. Ky. L. Rev. 129, 129 (1995) ("The absence of guidance from the

presents an ideal opportunity for this Court to provide much-needed guidance.

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS ON THE NOTICE REQUIRED BEFORE A PARTY MAY BE PENALIZED FOR VIOLATING REGULATORY REQUIREMENTS.

Further heightening the need for review is the conflict between the Fourth Circuit's decision and the decisions of other federal courts of appeals on the notice required before a party may be penalized for violating regulatory standards.

It is a fundamental principle of due process that a party receive "fair notice" before being deprived of property. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "[B]ecause we assume that [a party] is free to steer between lawful and unlawful conduct, we insist that laws [provide] a reasonable opportunity to know what is prohibited, so that [a party] may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). As a result, a party cannot be assessed civil penalties under a regulatory regime where it lacks fair warning of prohibited conduct. *See, e.g., General Elec. Co.* v. *EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

United States Supreme Court * * * concerning this provision has produced conflicting opinions within the federal circuit courts."); Arne R. Leonard, *When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?*, 35 Nat. Res. J. 555, 582 (1995) ("Currently, the circuits are in conflict regarding the nature and scope of subsection 309(g)'s preclusiveness."); Steven Russo, *States, Citizens, and the Clean Water Act: State Administrative Enforcement and the Diligent Prosecution Defense*, 4 N.Y.U. Envtl. L. J. 211, 232 (1995) ("The requirement that state enforcement be pursuant to a law that is 'comparable' to section 309(g) has also led to * * * wildly inconsistent application of [the] bar.").

Here, Smithfield plainly lacked notice that—in EPA's view—it was violating the CWA. The phosphorous standard that Smithfield was penalized for allegedly violating is a state limit not required by federal law. The Board and Smithfield agreed to a plan that relieved Smithfield from meeting that state limit while the connecting pipeline to HRSD was being constructed, in exchange for Smithfield's withdrawal of its legal challenges to the limit. EPA received notice of the agreement and raised no objection. Smithfield subsequently sought and received assurances from the Board that it would be in compliance with the phosphorous and other state limits so long as it connected to HRSD within the requisite time-frame and that it need not meet those limits during the interim. EPA received notice of these assurances and once again remained silent. EPA also undertook a close review of the project in connection with the Commonwealth's approval of over $50 million in assistance from a fund largely funded by EPA for HRSD to upgrade its facilities to implement the 1991 Special Order. Smithfield knew that EPA was aware of its dealings with Virginia regulatory authorities, and thus had every reason to believe that it was in compliance with the phosphorous and other state limits. Yet despite remaining silent and acquiescing for five years, EPA sued Smithfield for the failing to meet the very limits the Board had assured Smithfield it need not meet pending connection to HRSD.

The Fourth Circuit's decision condoning EPA's action conflicts with numerous decisions of other circuits on the minimum notice required in such circumstances. In *General Elec. Co.* v. *EPA*, *supra*, for instance, EPA interpreted a regulation mandating disposal of certain materials as prohibiting their distillation prior to disposal, and fined a company that had engaged in pre-disposal distillation. In setting aside the fine, the D.C. Circuit held that the company had not received fair notice of EPA's interpretation because two regional offices had apparently advised that pre-disposal

distillation was permitted. Such "confusion" over the meaning of the regulation was "evidence that the agency's interpretation of its own regulation could not possibly have provided fair notice." 53 F.3d at 1332.

Likewise, in *Lloyd C. Lockrem, Inc.* v. *United States*, 609 F.2d 940 (9th Cir. 1979), and *Kent Nowlin Construction Co.* v. *Occupational Safety & Health Review Commission*, 593 F.2d 368 (10th Cir. 1979), federal regulators cited companies laying sewer lines for violations relating to "trenches" and "excavations" as those terms were used in federal regulations. Noting the "disagreement among the Secretary's compliance officers, the administrative law judge, and even among the commissioners of the Review Commission as to the interpretation, interrelationship and application of the regulations involved," 593 F.2d at 370; *accord* 609 F.2d at 944, the Ninth and Tenth Circuits, respectively, held that the companies had not received fair warning that the regulations applied to their activities. As the Tenth Circuit put it, regulated entities "should not be penalized for deviation from a standard the interpretation of which * * * cannot be agreed upon by those who are responsible for compelling compliance with it and with oversight of the procedures for its enforcement." 593 F.2d at 371; *accord* 609 F.2d at 944.

Similarly, in *Diamond Roofing Co.* v. *Occupational Safety & Health Review Commission*, 528 F.2d 645 (5th Cir. 1976), the Fifth Circuit held that a group of roofing companies had not received fair notice that a regulation requiring that railings be placed around open-sided floors applied as well to open-sided roofs where "there was disagreement even among OSHA Compliance Officers as to whether [the regulation] applied to open-sided roofs as well as floors." *Id.* at 649.

Here, even though state and federal authorities clearly disagreed over whether Smithfield was in compliance with the state phosphorous and other limits—and Smithfield relied

on assurances from the primary regulating authority that it would be in compliance by investing millions of dollars in taking extreme corrective action—the Fourth Circuit decided that Smithfield had fair notice that it was violating the CWA. *See* App. 12a, 15a-16a. That ruling squarely conflicts with the decisions of the D.C., Ninth, Tenth, and Fifth Circuits holding that parties lacked fair notice where authorities differed on whether certain conduct was prohibited or required. The lack of fair notice afforded Smithfield is particularly intolerable given that EPA sat back and did nothing for five years while Smithfield acted with the approval of state authorities, allowing alleged violations to pile up before bringing suit. *Cf. United States* v. *AM General Corp.*, 34 F.3d 472, 475 (7th Cir. 1994) (refusing to allow EPA "to mount a collateral attack on a permit by bringing a civil penalty action as many as five years after the permit had been granted * * * by which time a defendant would have accrued a potential liability in excess of $40 million even though it had been operating under a permit valid on its face and never before challenged").

Finally, the Fourth Circuit's decision conflicts with the Sixth Circuit's decision in *Diebold, Inc.* v. *Marshall*, 585 F.2d 1327 (6th Cir. 1978). There, the court held that a manufacturer lacked fair warning that an OSHA regulation required "guarding" of certain machines where, among other things, "common understanding and commercial practice" was that guarding was not required. *Id.* at 1336. So too here, Smithfield acted pursuant to the "common understanding" that a regulated entity should be able to rely on an agreement with state authorities on the method of complying with a state effluent limitation—particularly where federal authorities have notice of that agreement. But the Fourth Circuit did not consider that basic understanding in determining whether Smithfield had fair notice.

* * *

Although the multiple conflicts engendered by the decision below alone provide a compelling basis for review, certiorari is particularly appropriate in view of the extraordinarily important concerns raised by this case. The Fourth Circuit's decision is an affront both to the principles of federalism and comity embodied in the CWA and to notions of fundamental fairness embodied in the notice requirement of the Due Process Clause. As evidenced by the numerous amici who participated in the proceedings below,[14] the decision has vast implications for regulated entities, which—having invested billions of dollars in compliance efforts—now potentially face "duplicative and inconsistent enforcement" actions such as those to which Smithfield was subjected.[15] This Court should grant certiorari to preserve the delicate balance of power Congress so carefully sought to maintain in the CWA, and to ensure that parties are treated fairly—and afforded adequate notice of whose word controls—in those circumstances when federal and state authorities collide.

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[14] The following associations and their members filed briefs below in support of Smithfield's position: American Automobile Manufacturers Association; American Meat Institute; American Petroleum Institute; Independent Petroleum Association of America; Integrated Waste Services Association; National Association of Manufacturers; Michigan Chamber of Commerce; Pennsylvania Chamber of Business & Industry; and Colorado Association of Commerce and Industry.

[15] Br. *Amici Curiae* of the American Automobile Manufacturers Association, *et al.*, at 3.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT.

No. 97-2709

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SMITHFIELD FOODS, INCORPORATED; SMITHFIELD PACKING COMPANY, INCORPORATED; GWALTNEY OF SMITHFIELD, LTD.,

Defendants-Appellants.

MICHIGAN CHAMBER OF COMMERCE; PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY; COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY; AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION; AMERICAN MEAT INSTITUTE; AMERICAN PETROLEUM INSTITUTE; INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA; INTEGRATED WASTE SERVICES ASSOCIATION; NATIONAL ASSOCIATION OF MANUFACTURERS,

Amici Curiae.

Argued: Oct. 26, 1998

Decided: Sept. 14, 1999

Before ERVIN and HAMILTON, Circuit Judges, and ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Judge ERVIN wrote the

opinion, in which Judge HAMILTON and Judge ANDERSON joined.

OPINION

ERVIN, Circuit Judge:

Smithfield Foods, Inc. ("Smithfield") appeals a grant of summary judgment in favor of the United States finding Smithfield liable for multiple Clean Water Act violations. Smithfield also challenges the court's imposition of a corresponding $12.6 million civil penalty.

Smithfield alleges that the court committed two errors with respect to liability. First, Smithfield claims that the district court erred when it found that Orders issued by the Virginia State Water Control Board did not condition, revise, or supercede Smithfield's obligations under its 1992 water discharge permit. Second, Smithfield asserts that the district court erred in its finding that this suit was not (1) precluded by the Supreme Court's holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987), or § 510 of the Clean Water Act ("CWA"), 33 U.S.C.A. § 1370 (West 1986); or (2) barred by § 309(g)(6)(A)(ii) of the CWA, 33 U.S.C.A. § 1319 (g)(6)(A)(ii) (West 1986 & Supp.1999). On the penalty issue, Smithfield contends that the district court erred in calculating the penalty, especially with respect to its determination of economic benefit and the denial of "good-faith" credit to Smithfield for its compliance efforts.

For the reasons that follow, we affirm the district court's grant of summary judgment on liability. We remand the penalty determination to the district court with instructions to recalculate the civil penalty as directed by this opinion.

I.

The facts of this case are undisputed and are comprehensively set out in the district court's published opinion, *United States v. Smithfield Foods, Inc.*, 965 F.Supp. 769, 772-81 (E.D.Va.1997). To properly analyze this case,

however, the major events bear repeating. Smithfield owns and operates two swine slaughtering and processing plants, Smithfield Packing Co. and Gwaltney of Smithfield, Ltd. Both plants are located on the Pagan River, a tributary of the James River, in Isle of Wight County, Virginia. The wastewater discharged from these plants is treated in two of Smithfield's facilities, Outfall 001 and Outfall 002. From at least August 1991 to August 1997, treated wastewater was discharged from Outfall 001 into the Pagan River. From at least August 1991 until June 1996, treated wastewater was discharged from Outfall 002 into the Pagan River. Smithfield stopped discharging wastewater into the Pagan River when it successfully connected its plants to the Hampton Roads Sanitation District ("HRSD") system.

A.

Smithfield's wastewater discharges contained numerous pollutants that were regulated under the CWA and thus, could not be discharged into the waters of the United States unless specifically authorized by permit. Permits are governed by the National Pollutant Discharge Elimination System ("NPDES"), under which polluters obtain an NPDES permit to discharge lawfully certain pollutants in specific amounts. *See* 33 U.S.C.A. § 1342 (West 1986 & Supp.1999). Regulation of NPDES permits is overseen by the Environmental Protection Agency ("EPA"), *see* 33 U.S.C.A. § 1342(a), but locally administered by the Commonwealth of Virginia through its agent, the Virginia State Water Control Board ("the Board"). *See* 33 U.S.C.A. §§ 1251(b), 1342(b) (West 1986 & Supp.1999). The Board is authorized to enforce the CWA subject to the guidance and approval of the EPA. *See* 33 U.S.C.A. § 1319.

Smithfield's discharges were authorized by an NPDES permit ("the Permit") issued in 1986, modified in 1990, and reissued in 1992. The Permit placed restrictions on the amount and concentration of certain pollutants allowed in

wastewater released to the Pagan River and required Smithfield to monitor, sample, analyze, and issue reports concerning its discharges. The results of Smithfield's wastewater sampling program were periodically compiled into Discharge Monitoring Reports ("DMRs") and submitted to the Board.

In response to elevated levels of nitrogen and phosphorus in the Chesapeake, the Commonwealth of Virginia promulgated regulations requiring, among other things, that NPDES permits for facilities discharging into nutrient-rich waters like the Pagan River be modified to allow a monthly average phosphorus effluent limitation of 2.0 mg/l. The new regulations represented a considerable reduction in the amount of phosphorus permittees like Smithfield could discharge. To comply, Smithfield would have had to upgrade significantly its waste-water treatment facilities, which the company contended was an insurmountable obstacle under the required deadline. As a result, on June 3, 1988, Smithfield filed suit challenging Virginia's new phosphorus limitation as technologically infeasible.

Notwithstanding the pending legal challenge, the Board reopened Smithfield's Permit on January 4, 1990 and modified it to apply the new, more restrictive phosphorus limitation. The modified Permit ("1990 Permit") also contained a compliance schedule requiring Smithfield to take steps to comply with the new phosphorus limitation within three years of the Permit modification. Smithfield contested this action by appealing the modification. Because these new phosphorus limitations were not required in other states, Smithfield also began to talk publicly about moving its operations out of Virginia rather than complying.

Negotiations between Smithfield and Virginia ensued and to settle the dispute, each of the parties agreed to various accommodations. The agreement was documented in an Order issued by the Board on March 21, 1990 ("the 1990

Order"), in which Smithfield agreed to study the costs and feasibility of solving its wastewater treatment problem by connecting its present wastewater treatment system to the HRSD. In addition, Smithfield pledged to report the results of these studies to the Board by November 13, 1990, by which time Smithfield would decide whether it intended to connect to HRSD or to upgrade its own facilities to comply with the new phosphorus limitations. In return, the Board resolved to defer the commencement of the 1990 Permit compliance schedule until December 1, 1990.

On November 6, 1990, the Board amended the 1990 Order by extending by three months the date by which Smithfield was to report its decision whether to connect to HRSD. The Board also agreed to further defer commencement of the compliance schedule for the new phosphorus limitations.

On May 9, 1991, the Board amended the 1990 Order a second time ("May 1991 Order") granting Smithfield another extension. The May 1991 Order included the following amendments:

> (1) Smithfield now had until June 15, 1991 to notify the Board of its commitment to connect to HRSD or upgrade its own facilities to comply with the new phosphorus discharge standard. If Smithfield decided to connect to HRSD, it was required to do so within three months of notification by HRSD that the necessary sewer line was completed and operational. If Smithfield decided not to connect to HRSD, it was required to upgrade its own treatment facilities to comply with all discharge limitations according to the scheduled deadline.
>
> (2) Smithfield had to comply with the interim effluent limitations listed in Appendix A of the May 1991 Order until it connected to HRSD or completed the necessary upgrades to its facilities. Appendix A set out new

discharge limitations and monitoring requirements for a pollutant other than phosphorus, but reiterated that required effluent limitations for all other substances remained as listed in the 1990 Permit.

(3) Smithfield was required to dismiss its legal challenge to the phosphorus standard pending in Virginia state court.

At the end of the May 1991 Order, the Board stated that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in the [1990] Permit." Within a month of receiving the May 1991 Order, Smithfield determined that connecting to HRSD would be the best long-term solution and notified the Board of its decision on June 7, 1991.

In the meantime, in May 1991, Smithfield's original Permit, issued in 1986 and modified in 1990, expired. The Board submitted a draft permit ("Draft Permit") for Smithfield's facilities to the EPA for review and public comment. Part I.B. of the Draft Permit contained the same compliance schedule as in the modified 1990 Permit, giving Smithfield until January 4, 1993 to comply with the phosphorus discharge limitations. Part I.C. of the Draft Permit listed the effluent limitations that would be in effect after the completion of the compliance schedule in Part I.B. The EPA approved the Draft Permit.

Smithfield submitted comments on the Draft Permit to the Board. In its comments, Smithfield expressed concern that the Draft Permit contained the same effluent requirements as in the 1990 Permit, which it believed were inconsistent with the terms of the May 1991 Order. Smithfield asked the Board for clarification of this alleged discrepancy, suggesting that the Board agree that "alternate compliance will be maintained with Smithfield's agreement to connect to HRSD as soon as it becomes available regardless of the time frame in which this

occurs." Debra Thompson, an environmental engineer with the Board, responded to Smithfield's concerns in an October 10, 1991 letter stating that "[a]ny special order agreements relative to compliance with water quality standards, the Permit regulation and associated studies that have been approved by the Board take precedence over the . . . Permit." The EPA received a copy of this letter.

Despite Smithfield's comments and concerns, on January 3, 1992, the Board finalized and issued Smithfield's new permit ("1992 Permit"). Part I.C. of the 1992 Permit retained the phosphorus discharge limitations listed in the 1990 Permit, and Part I.B. contained the same deadline for achieving phosphorus compliance, January 4, 1993. Smithfield never challenged the 1992 Permit conditions nor sought a modification.

In response to a February 1992 letter from Smithfield to the Board indicating that Smithfield intended to comply with effluent limitations for substances other than phosphorus as listed in the 1992 Permit by connecting to the HRSD system, the Board responded as follows:

> These "plans" are acceptable as submitted. The remainder of the schedule requires submittal of quarterly progress reports. These reports should indicate construction progress and other issues which may effect completion of the project. Also note that the deadline for achieving final effluent limitations [for substances other than phosphorus] is May 13, 1994. Should construction be delayed such that this deadline may be missed, a modification to the existing Consent Order should be requested.

Smithfield met neither the January 4, 1993 compliance deadline for phosphorus discharges, nor the May 13, 1994 compliance deadline for the other regulated substances. There is no evidence that Smithfield sought or received a permit

modification challenging these deadlines before failing to adhere to required compliance schedules.

In November 1994 the Board amended the May 1991 Order, stating that Smithfield could achieve compliance with the final effluent limitations for the substances other than phosphorus by connecting to HRSD and agreed to hold the compliance deadline scheduled for May 13, 1994 in abeyance. In addition, however, the Board and Smithfield agreed that the amendment did not alter, modify, or amend any other term or condition of the May 1991 Order or of the 1992 Permit.

Before Smithfield could connect to HRSD, three things needed to occur: (1) Smithfield needed to upgrade its own wastewater treatment system to pretreat its waste before discharging it to HRSD, (2) a new pipeline had to be built to connect Smithfield with HRSD, and (3) HRSD needed to upgrade its facilities to treat Smithfield's wastewater. HRSD's original completion schedule was February 1995 for the pipeline, and December 1996 for the facility upgrade. The pipe-line was not completed until March 1996 and Smithfield's Outfall 002 was connected to HRSD in June 1996. Outfall 001 could not be connected until HRSD completed its facility upgrades. The facility upgrades were not completed until June 1997 and Outfall 001 was connected to HRSD in August 1997.

Under the NPDES program as administered by EPA, permit holders who are not in compliance with the terms of their permits are listed in the EPA's Quarterly Noncompliance Report ("QNCR"). Although it had been out of compliance for months, Smithfield's Permit violations did not appear in the QNCRs until the third quarter of 1994. The EPA cited Smithfield's false and inaccurate reporting and the Board's willingness to permit Smithfield to continue to exceed its 1992 Permit limits as the reason why Smithfield's violations did not appear in the QNCRs. If a state does not

achieve compliance, the CWA authorizes the EPA to step in and initiate its own enforcement action. Once Smithfield appeared in the QNCR, EPA began to closely track Virginia's efforts to bring Smithfield into compliance.

In 1995 state and federal agencies began a criminal investigation into the illegal activities of Terry Rettig ("Rettig"), chief operator of Smithfield's wastewater treatment plant. Rettig was charged with falsifying records and DMRs submitted to both state and federal regulatory agencies. When Rettig's actions came under suspicion, he destroyed presumably incriminating records from Smithfield's wastewater treatment operations. At the beginning of the criminal investigation, federal investigators asked Virginia authorities to refrain from pursuing an enforcement action against Smithfield for its Permit violations until after the criminal investigation into Rettig's conduct was underway. In February 1996, the United States notified Virginia that there was no longer any need to delay pursuing an enforcement action against Smithfield, but the Commonwealth took no action.

In April 1996, the Virginia Department of Environmental Quality informed the Board that it had evidence of Smithfield's numerous CWA violations and recommended that legal action be initiated. At their meeting in May 1996, the Board decided to do nothing until it was sure Smithfield was aware of the violations.

When it became apparent to the EPA that Virginia did not intend to initiate legal action against Smithfield for its CWA violations, the EPA filed its own action. The EPA invited Virginia to join the suit, but the Commonwealth declined, electing instead to file its own enforcement action in the Circuit Court of the County of Isle of Wight. Virginia's enforcement action alleged that Smithfield violated its 1992 Permit discharge limits on other substances, but did not

include claims for violations of the phosphorus limitations, false reporting, or late reporting.

B.

The government filed suit in the United States District Court for the Eastern District of Virginia on December 16, 1996, seeking injunctive relief and penalties for a range of effluent limit violations, submission of false DMRs, submission of late reports, and destruction of records. On March 10, 1997, the United States moved for summary judgment on liability arguing that there were no disputes of material fact and the evidence proved that Smithfield had (1) violated the CWA by discharging pollutants into the Pagan River at levels above the allowable limits of its 1992 Permit, and (2) submitted false DMRs late on numerous occasions.

Smithfield countered that it did not violate the phosphorus limitations in the 1992 Permit because the Board's Orders superseded and revised the 1992 Permit limitations. In the alternative, even if it violated the terms of its 1992 Permit, Smithfield argued that the EPA's claim was barred by § 309(g)(6)(A) of the CWA and the doctrines of estoppel and waiver. The district court granted summary judgment for the United States on liability and claims of false reporting and document destruction, but decided to calculate the exact number of violations and the penalty amount at trial.

The district court held a bench trial on the remaining issues in July 1997. The court reviewed evidence and heard from both sides' experts who opined on the proper calculations for each of the factors to be considered under the CWA's penalty statute. In the end, the district court found Smithfield liable for 6,982 days of violations and, after weighing the mitigating and aggravating circumstances, assessed a penalty of $12.6 million.

Meanwhile, the Commonwealth's enforcement action against Smithfield continued to proceed in state court. On

July 9, 1997, the state court declared that Smithfield's obligations under the 1992 Permit were circumscribed by the May 1991 Order, and therefore Smithfield was required to comply with the phosphorus limits only by connecting to HRSD within three months of availability.

Based on this decree, Smithfield filed a motion to dismiss or for summary judgment in this federal action. Arguing that the imposition of the phosphorus limitation was imposed solely as a matter of state law, Smithfield contended that the federal court must give substantial weight to the Virginia court ruling in a state enforcement action. On that basis, Smithfield asked the district court to reverse its liability finding. The district court declined to do so.[1] Smithfield now appeals the district court's ruling.

II.

Smithfield's initial challenge is to the district court's grant of summary judgment in favor of the United States on the issue of liability. We review the grant of summary judgment viewing all evidence in the light most favorable to the nonmovant. *See Sempione v. Provident Bank of Maryland*, 75 F.3d 951, 954 (4th Cir.1996). The district court allegedly made three distinct errors.

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[1] The Commonwealth appealed the Circuit Court's decision to the Supreme Court of Virginia. The action was pending when the parties filed their briefs to this Court. On June 5, 1998, the Supreme Court of Virginia reversed and vacated the judgment below. Based on the Commonwealth's continued agreement with Smithfield that the May 1991 Orders modified the phosphorous limitations set out in the 1992 Permit, the Virginia Supreme Court found that Smithfield was not entitled to a declaratory judgment because it failed to demonstrate a justiciable controversy between the parties. *See Treacy v. Smithfield Foods, Inc.*, 256 Va. 97, 500 S.E.2d 503, 507 (1998).

First, Smithfield contends that the district court erred in finding that the May 1991 Order did not take precedence over or alter the terms of the 1992 Permit. Smithfield admits that the May 1991 Order explicitly states that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in [the] Permit," but argues that the May 1991 Order was incorporated into, and therefore took precedence over, the 1992 Permit. In the alternative, Smithfield insists that the EPA was bound by the terms of the May 1991 Order when it failed to object to it during the permitting process.

The district court rejected these arguments, holding that the 1992 Permit could not have incorporated any of the Board's Orders. *See Smithfield*, 965 F.Supp. at 790. After an extensive analysis of the Board's post-1992 Permit correspondence, the court reasoned that "because [Smithfield] did not follow the procedures required for the modification of a permit, and none of the Board's Special Orders and letters were issued in accordance with the permit modification procedures, [Smithfield] cannot support [its] argument that the Special Orders or letters issued by the Board after the 1992 Permit modify the terms of the Permit. . . ." *Id.* at 787-88.

With respect to the Board's Orders predating the 1992 Permit, the court found it illogical that correspondence written before the 1992 Permit was finalized could change the terms of a subsequently-issued document. *See id.* at 788. Finally, regarding Smithfield's assertion that the EPA was bound to abide by the Board's Orders because the agency failed to object contemporaneously, the court found that the agency's "silence with regard to the agreement between Smithfield and the Board does not indicate its approval, especially when the EPA was not asked to review and approve of Smithfield's agreement with the Board." *Id.*

Second, Smithfield argues that the district court erred when it found that the EPA's suit was not barred by CWA § 309(g)(6)(A)(ii). *See* 33 U.S.C.A. § 1319(g)(6)(A)(ii). Section 309(g)(6) of the CWA provides in part that any violation of the CWA "which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection" shall not be the subject of a federal civil enforcement action. *See id.* Because Smithfield believes that since 1990 Virginia has been diligently prosecuting Smithfield through the issuance of Orders and enforcing a state statutory scheme that is sufficiently comparable to the CWA, Smithfield asserts that the EPA's enforcement action should have been barred.

Examining this argument, the district court found that Virginia's enforcement scheme was not sufficiently comparable to § 309(g) to bar the EPA suit. Because Virginia's enforcement scheme did not give the Commonwealth authority to assess administrative penalties without the violator's consent,[2] and did not provide adequate procedures for notice and public participation,[3] the district court found

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[2] In 1996, Virginia amended its enforcement scheme to allow the Commonwealth to impose administrative penalties without the permission of the violator. *See* Va. Code Ann. § 62.1-44.32 (Michie 1998). Smithfield argues that, because the law was amended before the filing of this suit, comparability should be judged based on the amended version of the statute. The basis of Smithfield's argument, however, is that Virginia had been "diligently prosecuting" the case by issuing Orders since 1990. The only Orders relevant to this case were issued in 1990, 1991, and 1994 and during that time, the Commonwealth could have imposed penalties only with Smithfield's consent. We decline to accept Smithfield's argument here. Because the amendment was not in effect when the relevant Orders were issued, it is not applicable to our inquiry of whether Virginia's law was comparable to § 309(g) at the time of the Commonwealth's enforcement action.

[3] As noted by the district court, the Commonwealth amended its public participation statutes in 1996 to allow citizens to obtain judicial review of

that the Commonwealth's statutory structure was not sufficiently comparable to CWA § 309(g). *See Smithfield*, 965 F.Supp. at 795.[4]

Third, Smithfield challenges the district court's finding that this suit was not precluded by the Supreme Court's holding in *Gwaltney*, 484 U.S. at 60-61, 108 S.Ct. 376. In *Gwaltney*, the Court recognized that there would be cases under the CWA in which it would be counterproductive to assess penalties against violators who had agreed to take corrective actions not otherwise required. *See id.* Smithfield asserts that is exactly what happened here. The Board and Smithfield reached a compromise in which Smithfield agreed to take non-mandatory corrective actions, and the company argues that for the district court to allow the EPA to assess administrative penalties after the fact violates *Gwaltney*.

For the same reasons, Smithfield contends, the EPA's enforcement action violates CWA § 510, which allows states to adopt more stringent effluent limits than those required under the CWA. *See* 33 U.S.C.A. § 1370. Smithfield argues that the Commonwealth's ability to adopt more stringent standards as provided by § 510 is rendered useless if it cannot implement those effluent limits in the manner it finds most directly serves the public interest. On these two grounds,

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an Order of the Board. *See Smithfield*, 965 F.Supp. at 795 n. 37. For the same reasons given above, *see supra* note 2, we agree with the district court that the timing of this amendment renders it irrelevant to this inquiry.

[4] Because the district court held that Virginia's enforcement scheme was not sufficiently comparable to § 309(g), the court found it unnecessary to address the issue of whether the Commonwealth was diligently prosecuting an administrative action against Smithfield. *See Smithfield*, 965 F.Supp. at 795. Smithfield did not challenge this ruling on appeal and, because we agree with the district court's ruling that the Commonwealth's scheme is not comparable to § 309(g), we similarly decline to address this issue.

Smithfield asserts that the district court erred in failing to hold that the EPA's enforcement action was precluded.

Acknowledging the Supreme Court's holding in *Gwaltney*, the district court found that Smithfield's alleged corrective actions did not preclude the EPA's enforcement action here because the chosen enforcement methods were not achieving compliance. *See Smithfield*, 965 F.Supp. at 790 n. 29 (citing *Gwaltney*, 484 U.S. at 61, 108 S.Ct. 376). Further, the court found that the text of CWA § 510 did not support Smithfield's argument. Besides allowing states to enforce more stringent standards, the CWA act also provides that the EPA has the authority to enforce these more stringent state effluent standards once they are incorporated into a polluter's permit. *See* CWA §§ 309(a)(1), (3), 33 U.S.C.A. §§ 1319(a)(1), (3). The district court agreed that Virginia adopted more stringent phosphorus standards than under the CWA and that these elevated standards were included in Smithfield's 1992 Permit. Once incorporated into the Permit, however, the district court found that the CWA requires the EPA to enforce a state's more stringent effluent standards. On that basis, the court ruled that § 510 did not preclude the EPA's enforcement action.

Having had the benefit of oral argument and the parties' briefs, and after careful consideration of the record and the applicable law, we conclude that the district court correctly decided the issue of liability. We concur with the district court that (1) the Board's Orders were not incorporated into nor changed the terms of the 1992 Permit;[5] (2) Virginia's enforcement scheme is not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent

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[5] Because we agree with the district court's ruling that the May 1991 Order did not change the terms of the Permit, we find it unnecessary to consider whether the EPA was bound by the terms of that Order.

penalty action; and (3) neither the Supreme Court's ruling in *Gwaltney*, nor § 510 of the CWA preclude the EPA from bringing this enforcement action. Rejecting Smithfield's claims of error, we affirm the district court's reasoning and ruling on liability. *See Smithfield*, 965 F.Supp. at 784-96.

III.

Smithfield's second major challenge is to the district court's assessment of a $12.6 million penalty. We review the factual findings that formed the basis of the district court's penalty calculation for clear error, *see Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 573 (5th Cir.1996), but the highly discretionary calculations necessary to award civil penalties are reviewed for abuse of discretion. *See id. See also Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 316-17 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987).

The CWA sets out six factors intended to assist courts in determining the appropriate civil penalty. *See* CWA § 309(d), 33 U.S.C.A. § 1319(d) (Supp.1999). Section 309(d) provides that "the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." *Id.*

These factors are designed to give district courts direction in fashioning penalties for CWA violations, but once applied in a specific case, we have given and will continue to give the district court's final penalty calculation wide discretion. *See Stoddard v. Western Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir.1986) ("The amount of the penalty to be levied is, of course, discretionary with the court."); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d

1128, 1142 (11th Cir.1990) (same). Because of the difficulty of determining an appropriate penalty in a complex case such as this one, we give deference to the "highly discretionary calculations that take into account multiple factors [that] are necessary in order to set civil penalties under the Clean Water Act." *Tull v. United States*, 481 U.S. 412, 427, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

Although Smithfield contests several of the district court's discretionary decisions, such as the method used to count each violation and the alleged trebling of the penalty, Smithfield's major allegations of error relate to the court's economic benefit calculation and its refusal to grant Smithfield good-faith credit for its compliance efforts. We consider each of these arguments in turn.

A.

Smithfield argues that the district court "double counted" its violations by counting separately its exceedances of daily maximum limits when it had already imposed thirty days of violations for exceedances of the monthly average limit for the same substance. In the opinion below, the district court reaffirmed our holding in *Chesapeake Bay Found.*, 791 F.2d at 313-15, that each violation of a monthly average limit shall be treated as a violation for every day in the month in which the violation occurred, rather than as a single violation for that month. *See United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 340 (E.D.Va.1997). The court went on to hold, however, that "if multiple violations of the Permit occur on the same day, defendants are liable for a separate day for each violation of the Permit, including the daily maximum, monthly average concentration, and monthly average loading limits for each pollutant." *Id.* at 340.

In coming to this conclusion, the district court reasoned that the two limits are included in the Permit for different reasons and serve distinct purposes: daily maximum effluent

limits protect the environment from the acute effects of large, single releases, and monthly averages protect against chronic effects occurring at lower levels. *See id.* at 340-42. Acknowledging that there was no Fourth Circuit precedent for this counting method, the district court found that the different pollutants and their daily maximum and monthly average loading limits are separate requirements listed in the Permit and therefore represent distinct violations. *See id.* at 341.

We find the district court's opinion persuasive here. It is clear from the language of § 309(d) of the CWA that such a penalty structure was anticipated. *See* 33 U.S.C.A. § 1319(d) (providing for a "civil penalty not to exceed $25,000 per day *for each violation*" rather than a statutory maximum of $25,000 per day) (emphasis added). The specific limitations of Smithfield's 1992 Permit support this conclusion as well. The daily maximum limits in the 1992 Permit were set at double its monthly average limits. As a result, a violation of one did not automatically result in the violation of the other, further supporting the notion that the different limits were included in the Permit to protect against distinct environmental effects. *See Smithfield*, 972 F.Supp. at 340-41.

Far from double counting, the district court's decision to treat each violation of the 1992 Permit as a separate infraction for purposes of penalty calculation makes sense. This structure gives courts considerable flexibility to tailor penalties to the unique facts of each case. As noted by the district court, a permittee who violates a single effluent limit one time is less culpable than one who violates the limits of several different pollutants in one day. *See id.* Such a structure is reasonable considering the first violator causes less overall harm to the environment. In the same vein, a permittee who violates a monthly average limit is less culpable and causes less harm than a permittee who violates

daily maximum and monthly average limits in the same month. *See id.*

Furthermore, this method of counting violations creates the proper incentives for polluters to comply. For example, if the maximum penalty that could be levied against a violator on a single day was $25,000, no matter how many different Permit effluent limitations were violated, the permittee would have a strong disincentive to comply with the other permit limitations. Once one effluent limit was violated, there would be no reason for the permittee to heed the rest of the permit limits for that day.

We agree with the district court's decision to treat each of Smithfield's permit violations as a separate and distinct infraction for purposes of penalty calculation. We feel this approach is consistent with the language of § 309(d) of the CWA and Smithfield's 1992 Permit and join the other courts which have interpreted the CWA in the same manner.[6]

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[6] *See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 78 & n. 28 (3d Cir.1990) (holding that violation calculations should be analyzed "on a parameter by parameter basis" and that each type of effluent limit is "clearly separate" and there is "no reason why [a defendant] should not be penalized separately for violating each limitation"); *Natural Resources Defense Council, Inc. v. Texaco Ref & Mktg., Inc.*, 800 F.Supp. 1, 21 (D.Del.1992) (finding that "separate exceedances of weight and concentration limits can constitute separate violations"); *Student Pub. Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, No. CIV.A.83-2040, 1988 WL 156691, at *11 (D.N.J. Mar.24, 1988) (concluding that "[e]ach violation of any express limitation in the permit may, of course, be treated as a separate violation for the purposes of assessing a penalty"); *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1046 n. 1 (W.D.Mo.1984) (suggesting that the CWA allows for separate penalties for violations of the daily limit of different pollutants). *But see Tyson Foods*, 897 F.2d at 1140 (declining to interpret § 309(d) as allowing single discharges that violate both daily and monthly limits to constitute distinct violations).

B.

Smithfield next argues that the district court erred as a matter of law by allegedly calculating the penalty by trebling the amount of economic benefit calculated. Pointing to the text of the Act, Smithfield contends that, unlike other federal statutes, the CWA does not provide for trebling and therefore the court committed reversible error by assessing a penalty equal to exactly three times the amount of economic benefit calculated. We see no indication that the district court "simply trebled the amount of economic benefit." Appellant's Br. at 42. On the contrary, we find that the district court correctly applied the CWA in assessing Smithfield's penalty.

In calculating the penalty, the district court properly began by determining that the statutory maximum based on Smithfield's violations was $174.55 million. *See Smithfield*, 972 F.Supp. at 353. Thereafter, the court evaluated two different methods used to assess penalties—the top-down method and the bottom-up method—and to Smithfield's advantage, chose the bottom-up method.[7] Under the bottom-up method, the court begins with the violator's estimated economic benefit from noncompliance, which here was $4.2 million, and then adjusts up or down based on the court's evaluation of the six factors set out in § 309(d). *See id.* at 353-54. After evaluating and discussing the effect of each of the factors, the court found a $12.6 million penalty appropriate. *See id.* at 354.

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[7] As noted by the district court, the CWA does not require the use of either method, however, courts have applied both. *See, e.g., Tyson Foods*, 897 F2d at 1142 (using top-down method in which a court begins with the statutory maximum and adjusts downward based on its evaluation of § 309(d) factors); *Hawaii's Thousand Friends v. City & County of Honolulu*, 821 F.Supp. 1368, 1395 (D.Haw.1993) (same). *But see United States v. Municipal Auth. of Union Township*, 150 F.3d 259, 265 (3d Cir. 1998) (applying the bottom-up method) (known as "*Dean Dairy*"); *Monsanto*, 1988 WL 156691, at *16 (same).

When calculating Smithfield's penalty, the district court took into account all six of the statutorily mandated factors and sufficiently detailed its findings as to whether the evidence in each area had a mitigating or aggravating impact on the total penalty. *See id.* at 354. The court properly exercised its discretion in weighing the evidence and determining the credibility of key witnesses and, in doing so, made several decisions that were highly favorable to Smithfield. In the end, however, the court found that Smithfield's thousands of CWA violations warranted a penalty far in excess of the economic benefit calculation.

We find that the court's analysis was complete and in line with what is required under the statute. It is clear from its opinion that the court's exhaustive examination of the facts formed the basis of its final penalty calculation, rather than simply multiplying the economic benefit by three as Smithfield contends.

But even if the court had simply trebled the economic benefit to determine the appropriate penalty, that was within its discretion, as long as it was below the statutory maximum of $174.55 million. As mentioned, the Supreme Court has emphasized that under the CWA, the highly discretionary calculations necessary to assess civil penalties are particularly within the purview of trial judges, *see Tull*, 481 U.S. at 426-27, 107 S.Ct. 1831, and we have continually given these determinations wide deference, reviewing them only for abuse of discretion. *See Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1116 (4th Cir.1988). The government asked for a $20 million penalty, but based on its analysis of the relevant factors, the district court determined that $12.6 million was more appropriate, which is approximately 7.2% of the maximum penalty that could have been assessed. Finding that the court did not abuse its discretion in calculating the penalty, we reject Smithfield's contention that the district court erred as a matter of law in determining the

penalty. *Accord Dean Dairy*, 150 F.3d at 265 (affirming a penalty that was calculated by doubling the economic benefit amount and intended to serve the goal of punishment and deterrence).

C.

Smithfield also argues that the district court erred as a matter of law by failing to give Smithfield credit for certain capital costs incurred and user fees paid when calculating economic benefit.

As one of the six factors the court must use to calculate CWA penalties, economic benefit is assessed to keep violators from gaining an unfair competitive advantage by violating the law. This is accomplished by including as part of the penalty an approximation of the amount of money the violator has saved by failing to comply with its permit. *See Powell Duffryn*, 913 F.2d at 80. The rationale for including this measure as part of the violators' fine is "to remove or neutralize the economic incentive to violate environmental regulations." *Dean Dairy*, 150 F.3d at 264.[8] As noted in the Senate Report accompanying the 1987 amendment adding the economic benefit factor to § 309(d), and as recognized by courts, the precise economic benefit a polluter has gained by violating its effluent limits may be difficult to prove, so "[r]easonable approximations of economic benefit will suffice." *Id.* (referring to S.Rep. No. 50, 99th Cong., 1st Sess. 25 (1985)).[9]

The statute does not define economic benefit and courts have applied different methods to determine the appropriate

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[8] *See also Powell Duffryn*, 913 F.2d at 80 ("Violators should not be able to obtain an economic benefit vis-a-vis their competitors due to their noncompliance with environmental laws.") (citation omitted).

[9] *See also Cedar Point Oil*, 73 F.3d at 576 ("[A] court need only make a 'reasonable approximation' of economic benefit when calculating a penalty under the CWA.").

amount.[10] The district court used the common "cost-avoided" method here whereby economic benefit is measured by determining "the avoided and/or delayed cost of compliance, . . . [using] the weighted average cost of capital (WACC) as a discount/interest rate."[11] *Smithfield*, 972 F.Supp. at 349 (footnote omitted). The rationale behind this method is that "[w]hen a company delays or avoids certain costs of capital and operations and maintenance necessary for compliance, the company is able to use those funds for other income-producing activities, such as investing that money in their own company." *Id.*

The cost-avoided method has been utilized elsewhere, *see, e.g., Laidlaw*, 890 F.Supp. at 481, and was chosen by the district court in its discretion in part based on the court's evaluation of the credibility of the government's expert witness. The cost-avoided method is not in conflict with the CWA or basic economic principles. On the contrary, it represents a logical method by which a violator in Smithfield's position can be disgorged of any profits it attained through its non-compliance. Finding no fault with the district court's choice to apply the cost-avoided method in this case, we reject Smithfield's claim that its application was in error.

Smithfield further alleges that even under the cost-avoided method, the district court should have given Smithfield credit

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[10] In *Dean Dairy*, the Third Circuit calculated a violator's economic benefit by determining that the company would have lost $417,000 per year in revenues from a customer it would have had to drop in order to reduce production enough to comply with its permit. 150 F.3d at 262-67. In most cases, however, the court applies the cost-avoided method applied by the district court in the instant case. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 890 F.Supp. 470, 481 (D.S.C.1995).

[11] The weighted average cost of capital method was chosen by the district court as a means by which to calculate the present value of the costs avoided.

for (1) capital expenses incurred to build a pretreatment facility and to modify a sludge lagoon in preparation for connecting to HRSD, and (2) future user fees paid that Smithfield claims allowed HRSD to construct the necessary facilities for Smithfield's connection. In support of this argument, Smithfield repeatedly asserts that these are expenses it would have gotten credit for had it built its own direct discharge treatment system.

Smithfield decided to connect to HRSD in 1991 and, from that time until HRSD became available in 1996 and 1997, Smithfield was responsible for complying with its 1992 Permit requirements. Its decision to ignore these requirements in the interim certainly benefitted Smithfield financially because, by failing to comply with the 1992 Permit limits, Smithfield avoided the costs of pollution control its competitors were simultaneously incurring by complying with the law. It is these costs that constitute Smithfield's economic benefit.

These capital expenses and user fees can reduce the economic benefit that Smithfield experienced from 1991 to 1996 or 1997 only in so far as they are duplicative of costs Smithfield should have incurred for interim compliance. The building of its pretreatment facility and the paying of user fees for future HRSD use were not costs Smithfield incurred to aid in compliance from 1991 to 1996 or 1997 and, therefore, should not have been credited to Smithfield during the district court's economic benefit calculation.

The final allegation of error with respect to economic benefit is Smithfield's contention that the district court erred in using the WACC to calculate the present value interest rate. In a footnote, Smithfield apparently thinks that the court's error was in accepting the testimony of the government's expert witness, Robert Harris ("Harris")—who persuaded the court to apply the WACC rate—rather than

accrediting its own expert who advocated application of a "risk-free" rate.

As part of calculating economic benefit, the court must apply an interest rate to determine the present value of the avoided or delayed costs. Harris advocated the use of the WACC rate which represents "the average rate of return a company expects to make for its investors, in order to maintain its current level of investors and its current level of business operations." *Smithfield*, 972 F.Supp. at 349 n. 18. Smithfield's expert used the "risk-free" rate, or the rate on short-term U.S. Treasury bills. The district court found Harris' approach to be the most appropriate and his testimony the most credible and, on that basis, decided to apply the WACC rate to determine the present value of Smithfield's economic benefit. *See id.* at 349 & n. 17. Smithfield argues that the district court chose to rely on Harris' testimony solely on the basis of credibility and failed to examine the differences in the suggested procedures.

We find this argument meritless. The district court is licensed to determine the credibility of expert witnesses and its assessments on such questions are entitled to deference by this Court. *See League of United Latin American Citizens, # 4552, v. Roscoe Indep. School Dist.*, 123 F.3d 843, 846 (5th Cir.1997). There is no indication from the evidence that the district court committed clear error in choosing to accredit Harris' testimony, nor that it accepted the WACC rate without examining the differences between the two methods. Given that Smithfield's argument is essentially that the district court accredited the wrong expert, we reject this assertion and affirm the district court's application of the WACC rate to determine the present value of Smithfield's avoided costs.

We do find troubling, however, the district court's summary finding that Harris' admitted WACC calculation error of approximately 4% was insignificant. *See Smithfield,*

972 F.Supp. at 349 n. 19. While it is true that, compared to $12.6 million dollars, a miscalculation of between $100,000-$200,000 seems immaterial, we see no reason that an admitted error should stand uncorrected in a judicial opinion. On this basis, we remand the penalty to the district court with instructions to recalculate the penalty solely to correct Harris' approximately 4% error.

D.

Finally, Smithfield alleges that the district court erred when it failed to give Smithfield credit for its good-faith efforts to comply by connecting to HRSD. Specifically, Smithfield argues that it should have received credit for its efforts to connect to HRSD because, even if it was mistaken, Smithfield believed that connecting to HRSD was the only applicable requirement in the interim.

Section 309(d) of the CWA requires a district court to consider "any good-faith efforts to comply with the applicable requirements" as a mitigating factor in the penalty calculation. 33 U.S.C.A. § 1319(d). In practice, a court evaluates the evidence to determine whether the permittee took any actions to reduce the number of violations or attempted to lessen the impact of their discharges on the environment. *See Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co., Inc.*, 786 F.Supp. 743, 751 (N.D.Ind.1992).

In its opinion, the district court began by acknowledging that Smithfield should receive credit for its decision to connect to HRSD when available, a decision that would eventually reduce its discharges to zero. The court went on, however, to focus its inquiry on whether there were any good-faith efforts to comply with the requirements set out in Smithfield's Permits during the relevant period—from 1991 until 1996 or 1997 when Smithfield connected to HRSD. In evaluating the facts presented at trial, the court found little evidence that the defendants made any good-faith efforts to

comply because Smithfield did not facilitate its connection to HRSD or mitigate its discharges by treating its wastewater or decreasing its releases of pollutants in the interim. *See Smithfield*, 972 F.Supp. at 350.

The court looked beyond these obvious facts, however, for other signs that Smithfield might have tried to mitigate its violations by evaluating Smithfield's other business practices. In doing so, the court found that during the relevant period Smithfield cut back on the number of times it curtailed production to achieve compliance, ignored the advice of its own consultants who pointed out serious deficiencies in the operation and maintenance of Smithfield's existing wastewater treatment plant, and dismissed evidence that its treatment plant employees were inadequately trained. Other than agreeing to connect to HRSD, the court found that Smithfield "apparently believed they could discharge as much and as frequently as they wanted into the Pagan River. . . ." *See id.* at 351.

The district court's finding of liability, with which we agree, was based on the notion that Smithfield impermissibly ignored its explicit obligations under its 1992 Permit by failing to comply with effluent limitations for the entire period between its decision to connect to HRSD and the time the connection was made. It is only reasonable, therefore, that Smithfield's efforts towards connecting to HRSD would not suffice as good-faith efforts to comply with its applicable permit requirements since, during this entire interim period, Smithfield made no effort to heed the specific limits established by its 1992 Permit.

Furthermore, the evidence supports the district court's ruling. The testimony presented at trial and the documentary evidence on which the court relied in making these factual findings illustrate that Smithfield did not make efforts to decrease its violations and, instead, relied on the unreasonable notion that as long as it connected to HRSD within three

months of availability, it was unnecessary to comply with the specific effluent limitations listed in its 1992 Permit during the five year interim. Finding that the district court's factual determinations regarding Smithfield's lack of good-faith efforts to comply with applicable requirements were not clearly erroneous, we affirm its findings on this issue.

IV.

For the foregoing reasons, we affirm the district court's grant of summary judgment on liability. We reverse and remand the penalty determination to the district court with instructions to recalculate the civil penalty to the extent required by this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. VIRGINIA,
NORFOLK DIVISION

Civ. A. No. 2:96CV1204.

UNITED STATES OF AMERICA,
Plaintiff,

v.

SMITHFIELD FOODS, INC.,
SMITHFIELD PACKING COMPANY, INC.,
AND GWALTNEY OF SMITHFIELD, LTD.,
Defendants.

Aug. 8, 1997

OPINION

REBECCA BEACH SMITH, District Judge.

This matter is before the court on the issue of the amount of civil penalties to be assessed against defendants for violations of the Clean Water Act ("Act") § 309(b) and (d), 33 U.S.C. § 1319(b) and (d), as alleged in Counts I through VII of the Complaint. On May 30, 1997, the court granted partial summary judgment to the United States on Counts I through V. The court found defendants liable for 164 days of violation for Count V, late reporting, but deferred calculating the days of violation for Counts I through IV, the effluent violations of defendants' Permit No. VA0059005 ("Permit"). On July 18, 1997, the court granted partial summary judgment to the United States on Counts VI and VII. With

regard to Count VI, submission of false discharge monitoring reports ("DMRs"), defendants stipulated to fifteen (15) days of violation. Since the court has already found defendants liable on Counts I through VII, the court must now determine (1) the days of violation for Counts I-IV and VII, (2) defendants' maximum liability for the violations, and (3) the appropriate civil penalty for those violations under Section 309(d) of the Act. The parties presented evidence and arguments on these remaining issues at a bench trial held from July 21, 1997, through July 25, 1997.

I. Days of Violation

A. Counts I-IV

Defendants' Permit imposes limits on the amount of pollutants that can be discharged from defendants' facilities into the Pagan River. Not only are there several different pollutants regulated by the Permit, but the Permit also contains different types of limits: daily maximum limits, monthly average loading limits,[1] and monthly average concentration limits. Daily maximum limits are designed to protect the environment from acute effects of pollutants discharged into the water. The monthly average concentration and loading limits are designed to protect against the chronic effects of pollutants in the wastewater. The monthly average concentration controls the concentration of an effluent in the waste stream, while the monthly average loading controls the total amount of pounds of effluent discharged per day. The concentration limits are designed to encourage a facility to operate its plant efficiently at all times by ensuring that facilities cannot cut back on their treatment efficiency to

[1] These limits have been referred to as monthly average mass limits and monthly average loading limits. The court will use the latter term herein.

discharge at a high concentration while maintaining compliance with the loading limits.

Under the Permit, defendants may sample their effluent as often as necessary to ensure that the reported monthly average values are representative of the discharges throughout all days of the month, and not just the result of a few days of violation of the daily maximum limit. Since the daily maximum limit is set at double the monthly average limit, it is possible to exceed a daily maximum limit without exceeding the monthly average limit for the same pollutant, and vice versa. It is also possible for a discharger to violate the monthly average concentration limit without violating the monthly average loading limit, and vice versa.

In accordance with the clear holding of the Fourth Circuit Court of Appeals in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 314-15 (4th Cir.1986) (each violation of a monthly average limit shall be treated as a violation for every day in the month in which the violation occurred, rather than as a single violation for that month), *rev'd on other grounds*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987), *remanded*, 844 F.2d 170 (4th Cir.), *judgment reinstated*, 688 F.Supp. 1078 (E.D.Va.1988), *aff'd in part, rev'd in part on other grounds, and remanded*, 890 F.2d 690 (4th Cir.1989), this court will count each violation of a monthly average concentration or loading limit as a violation for every day of the month in which the violation occurred.[2] Furthermore, if multiple violations of the Permit occur on the same day, defendants are liable for a separate day for each violation of the Permit, including the daily maximum, monthly average concentration, and monthly average loading limits for each pollutant. This determination

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[2] *See Atlantic States Legal Found Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1139-40 (11th Cir. 1990) (following *Gwaltney*); *Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co.,Inc.*, 786 F.Supp. 743, 747 (N.D.Ind.1992) (same).

is consistent with Section 309(d) of the Act, which specifically provides for a "civil penalty not to exceed $25,000 *per day for each violation*" (emphasis added), rather than a statutory maximum of $25,000 *per day*. The different pollutants, and their daily maximum, monthly average concentration, and monthly average loading limits, are included in the Permit for different reasons. Each limit is a separate, distinct requirement in the Permit which can be violated. Accordingly, where multiple violations of defendants' Permit occur on one day, the maximum penalty on that day may exceed $25,000.[3]

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[3] Although there is no Fourth Circuit precedent on this issue, *see Gwaltney*, 791 F.2d at 307-08 n. 8 (declining to "address the question whether multiple violations attributable to a single day may give rise to a maximum penalty in excess of $10,000 [, the statutory maximum at the time,] for that day"), several courts in other circuits have held that a violation under every permit limitation for each effluent and each type of effluent limitation constitutes a separate and distinct violation. *See, e.g., Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 77-78 (3d Cir.1990), *cert. denied*, 498 U.S. 1109, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991) (rejecting contention that a discharge which violated more than one permit parameter should be counted as a single violation, and holding that violation calculations should be undertaken "on a parameter by parameter basis"; with regard to the different types of limitations, holding that each type of limit is "clearly separate" and there is "no reason why [a defendant] should not be penalized separately for violating each limitation"); *Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing, Inc.*, 800 F.Supp. 1, 20-21 (D.Del. 1992) ("separate exceedances of weight and concentration limits can constitute separate violations"), *affd in part, rev'd in part on other grounds*, 2 F.3d 493 (3d Cir.1993); *Student Pub. Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, No. CIV.A.83-2040, 1988 WL 156691, at *11 (D.N.J. Mar.24, 1988) (Since "[e]ach violation of any express limitation in the permit may, of course, be treated as a separate violation for the purposes of assessing a penalty," the total penalty for any given day may exceed the statutory maximum.); *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1047 n. 1 (W.D.Mo, 1984) (in dicta, construing the language in Section 1319(d) to allow for separate penalties for violations of the daily limit for two or more different

The court's approach to calculating the days of violation gives sufficient flexibility to assess penalties suitable to the particular circumstances of the case. For example, a permittee who violates one pollutant limit of a permit on a single day is less culpable and causes less harm to the environment than a permittee who violates the limits of several different pollutants on that day. Similarly, a permittee who violates a monthly average concentration limit in a certain month is less culpable and causes less harm to the environment than a permittee who violates daily maximum, monthly average concentration, and monthly average loading limits in that month. If the court found that the maximum penalty for any single day was $25,000, there would be no incentive for a permittee to comply with other pollutant limitations in the permit, once one limitation in the permit was violated on that day. Thus, consistent with the language of Section 309(d), and the different effluent requirements in the Permit, the court will treat *each* violation of the Permit as a separate and

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pollutants); *cf. Tyson Foods*, 897 F.2d at 1138-40 (With regard to violations of different pollutants, the court found that the only reasonable interpretation of "$25,000 per day of each violation" in Section 309(d) was that "the daily maximum penalty applies separately to each violation of an express limitation," and thus there is no daily cap, as each excessive discharge of a pollutant on a given day will subject the polluter to the $25,000 maximum fine. However, the court refused to count the daily maximum violation separately from monthly average violations for the same pollutant (which were counted as a daily violation for each day of the month), because the court found this "may result in imposing two fines for the same illegal act.") *But see Chesapeake Bay Found., Inc. v.Gwaltney of Smithfield*, 611 F.Supp. 1542, 1554-55 (E.D.Va. 1985) (subsequent history omitted) (In spite of the fact that there were many "days of violation" on which multiple violations were found to have occurred, the district court declined to set the maximum penalty for a given day at more than $10,000 (the maximum), regardless of whether more than one violation occurred for several substances on that day.) (citing *United States v. Detrex Chem. Indus., Inc.*, 393 F.Supp. 735 (N.D.Ohio 1975)).

distinct day of violation in assessing a civil penalty under the statute.

Finally, based on the credible testimony of Lorraine H. Reynolds, an environmental scientist with the Environmental Protection Agency ("EPA"), and in light of the court's determination regarding the calculation of the days of violation, the court FINDS that defendants reported in the DMRs the following days of violation of their Permit effluent limits: 5,112 for phosphorus, 459 for ammonia, 200 for total Kjeldahl nitrogen ("TKN"), 72 for fecal coliform, 63 for total suspended solids ("TSS"), 4 for ph,[4] 4 for cyanide, 4 for chlorine, and 1 for oil and grease. Accordingly, for Counts I through IV, defendants are liable for a total of 5,919 days of violation of the effluent limitations in the Permit.

B. Count VII

The record-keeping requirements of the Permit include the requirement that defendants maintain three years of records of the collection and analysis of samples used in generating the DMRs, such as laboratory analysis records and bench sheets. At trial, it was established that defendants' records covering the period up to December, 1993, were destroyed on or around July 21, 1994, by Terry Rettig, chief operator of defendants' wastewater treatment plants. Thereafter, defendants did not have the correct amount of records, as they only had seven months of records, from January, 1994, through July, 1994, instead of three years of records. Since defendants did not have three years of records until December 31, 1996, they were in violation of the record-keeping requirements in the Permit for two years and five months, or 884 days, from August 1, 1994, until December 31, 1996.

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[4] pH is "a measure of the acidity or the alkalinity of the water. Very low pH would be acidic, and acidic waters are also toxic as are very alkaline waters." Tr. at 158.

At trial, defendants argued they should only be assessed one day of violation for the record-keeping requirement violations. They claim the records were maintained for those 884 days, and were only destroyed on a single day in July, 1994, by Rettig, in direct contravention of company policy and an order from his immediate superior to find and produce the records for the inspectors from the Department of Environmental Quality ("DEQ").[5] The court declines to treat these 884 days of missing records as a single day of violation. First, defendants' explanation for the missing records is irrelevant with regard to the number of days of violation,[6] as the Clean Water Act is a strict liability statute. *See Stoddard v. Western Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir.1986). Second, treating destruction of records as a single violation would create a terrible incentive to destroy records covering a certain time period to get one single day of violation, rather than submitting the records which might reflect a larger number of days of violation. Thus, for Count VII, the court FINDS there are 884 days of violation of the record-keeping requirements in the Permit for defendants' failure to maintain or destruction of records.

C. Summary of Total Days of Violation

For Counts I through IV, there is a total of 5,919 days of violation of the effluent limitations in the Permit.[7] For Count

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[5] The DEQ was formed in 1993, pursuant to a state statute passed in 1992. The DEQ then encompassed its predecessor, the State Water Control Board.

[6] Defendants' explanation may be relevant, however, with regard to the appropriate penalty for these days of violation. *See infra* Part III.A.4.b.

[7] Defendants' contention that they are entitled to an "upset defense" under Section 309(d), because, in the fall of 1994, they suffered a single operational plant upset, caused in part by warm weather, is unsupported by the evidence. Their reliance on a state DEQ report, defense exhibit 61, is insufficient. Thus, this "upset defense" does not merit any further discussion. The court does note that this claim technically is not an

V there are 164 days of violation for late reporting, as found by the court on May 30, 1997. For Count VI, defendants have stipulated there are 15 days of violation for submission of inaccurate DMRs. For Count VII, defendants are liable for 884 days of violation of the reporting requirements for their failure to maintain or destruction of records. Thus, there is a total of 6,982 days of violation of the Permit by defendants.[8]

II. Statutory Maximum Penalty

Section 309(d) of the Act provides that defendants "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." Thus, for defendants' 5,919 days of violation in Counts I through IV (effluent limit violations), the statutory maximum is $147,975,000. For defendants' 164 days of violation in Count V (late reporting), the statutory

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affirmative defense, as apparently presented by defendants, but rather a limiting factor on the calculation of the number of days of violation under Section 309(d). In any event, the evidence and facts of this case do not warrant such a limitation.

[8] During the entire trial, defendants' approach to their Permit violations was rather cavalier. They repeatedly argued there was no real harm caused by their numerous violations, and stressed that the Pagan River would still be environmentally damaged, and unsafe for swimming and shellfish harvesting, even if defendants complied with their Permit. Such arguments miss the mark. As the United States pointed out in closing argument:

> The goal of the Clean Water Act is bit by bit to clean up the waters of the United States . . . . The defendants cannot evade their responsibility for their part in the damage to the Chesapeake Bay through the discharge of phosphorus [and other effluents] into the Chesapeake Bay by saying, "If you took ours out, it wouldn't make any difference" because everybody contributing to the Bay bears a responsibility for what went into the Bay.

Tr. at 970. A violator cannot escape liability or penalties for Permit violations simply by pointing to the violations of others. Each must do its part to clean up the environment. Only then will the goals of the Clean Water Act be achieved.

maximum is $4,100,000. For defendants' 15 days of violation in Count VI (submission of inaccurate DMRs), the statutory maximum is $375,000. For defendants' 884 days of violation in Count VII (failure to maintain or destruction of records), the statutory maximum is $22,100,000. Accordingly, the total statutory maximum penalty for defendants' 6,982 total days of violation of their Permit is $174,550,000, or $174.55 million. However, before assessing any penalty, the court must first review the facts of the case in light of certain factors set forth in Section 309(d).

III. Appropriate Civil Penalty for Defendants' Violations

A. Section 309(d) Factors

Section 309(d) of the Act provides that "[un determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." The court will address each of these Section 309(d) factors in turn.

1. Seriousness of Violations

In determining the seriousness of defendants' violations, the court will consider the frequency and severity of the violations, and the effect of the violations on the environment and the public. *See United States v. Avatar Holdings, Inc.*, No. CIV.FTM.93-281-21, 1996 WL 479533, at *6 (M.D.Fla. Aug.20, 1996) (unpublished) (the seriousness of the violations is determined by considering "the number, duration and degree of the violations as well as the actual or potential harm to human health and the environment"; "[a] substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal environmental damage"); *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*

(TOC), Inc., 956 F.Supp. 588, 602 (D.S.C.1997) ("presence or absence of environmental harm is relevant" to the penalty assessment).

a. Counts I-IV: Effluent Limit Violations

i. Frequency and Severity of the Violations

With regard to frequency, the phosphorus limit violations were very frequent in this case, and the TKN and ammonia limit violations were frequent enough to cause concern. Between December, 1991, and February, 1997, defendants exceeded their phosphorus limits in at least 69% of all months for Outfall 001 and 76% of the months for Outfall 002.[9] Defendants also exceeded TKN limits in at least 41% of the months for Outfall 001 and 13% of the months for Outfall 002, and ammonia limits in at least 25% of the months for Outfall 001 and 5% of the months for Outfall 002.

Based on the credible testimony and evidence, most of defendants' violations were severe. With regard to the severity of the violations, some courts consider the extent to which a violator's discharges exceed the permit limits to assess the seriousness of the violation. *See, e.g., Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 720 F.Supp. 1158, 1161, 1163, 1166 (D.N.J.1989), *aff'd in part, rev'd on other grounds*, 913 F.2d 64 (3d Cir.1990), *cert. denied*, 498 U.S. 1109, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991). In this case, the credible evidence was that most of defendants' effluent limit violations extensively exceeded the Permit limits. On average, defendants exceeded the phosphorus limits by 1,055%, fecal coliform limits by 1,365%, ammonia limits by 97%, cyanide limits by 168%, oil and grease limit by 114%, and the TSS limit by 63.5%. The only exceedances that were

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[9] Defendants operate two wastewater treatment plants located on the Pagan River, Outfall 001 and Outfall 002.

slightly above the limits were TKN discharges, which exceeded the limits by 35%, and chlorine discharges, which exceeded the limits by 8%. Thus, defendants' effluent violations were frequent and severe.

ii. Impact on the Environment and the Public

The court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect. *Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing, Inc.*, 800 F.Supp. 1, 21 (D.Del.1992); *United States v. Roll Coater Inc.*, 21 Envtl.L.Rep. 21073, 21075 (S.D.Ind.1991) (also noting that lack of damage is a mitigating factor).

Defendants' wastewater treatment plants, Outfalls 001 and 002 (Gwaltney). are located on the Pagan River at approximately river kilometer 9 and at approximately river kilometer 6, respectively. Outfall 001 discharges into a marshy area. Upstream of Outfall 001, the Pagan River is sparsely developed.

The watershed for the Pagan River is approximately 50% forest. The river is a relatively shallow estuary, most of which is surrounded by marsh. Direct harvesting of shellfish in the Pagan is prohibited. However, the river is used by the public for recreational boating, fishing, crabbing, hunting, and swimming. The Pagan is of moderate salinity (mesohaline) from kilometer 0, which is at the confluence with the James River, to kilometer 10 or 11. After approximately kilometer 10 or 11, the Pagan is of lower salinity (oligohaline).

On average, defendants' discharges accounted for approximately 10% of the freshwater flow into the Pagan River and as much as 50% of freshwater flow during low flow periods. It is during low flow periods that water quality can most exacerbate biological effects. Based on the EPA's "Fraction of Freshwater Flow" model based on salinity, and

historic modeling efforts used to describe the particular tidal flushing characteristics of the river, the credible evidence is that pollutants introduced at Outfalls 001 and 002 will peak near, or just upstream of, Outfall 001.

(a) Nutrients

Phosphorus and nitrogen are nutrients.[10] Nutrients do enable living organisms to grow, but they can be harmful in large quantities. Excessive nutrient loadings,[11] or nutrient enrichment, in the Pagan River cause eutrophication and are a primary cause of the absence of submerged aquatic vegetation ("SAV") in the Pagan River. Eutrophication is the over stimulation or overproduction of organic carbon in an estuary. Excessive nurient loadings stimulate productivity of algae, which decreases sunlight to plants, and causes increased algae growth on plants and increased turbidity. Eutrophication is likely to cause changes in phytoplankton, zooplankton, and benthos, which can affect fish. To limit eutrophication, the Chesapeake Bay Program has established SAV restoration goals of .02 mg/l for phosphorus in bodies of water with low salinity, and .01 mg/l in waters with moderate salinity.

SAV is a critical component of the ecosystem. It has tremendous habitat value, as there are generally more fish, crabs, and benthic (bottom-dwelling) organisms in habitats with SAV than in habitats without SAV. The Chesapeake Bay Foundation has directed major efforts towards reducing nutrient loadings to the Chesapeake Bay and encouraging

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[10] While there was no limit in defendants' Permit for total nitrogen, nitrogen was measured by TKN limits before May 13, 1994, and by ammonia limits after May 13, 1994. TKN includes ammonia and a measure of organic nitrogen, which can break down into ammonia and subsequently consume oxygen. In the river, when oxygen is consumed, ammonia may be converted into nitrite or nitrate.

[11] As noted previously, the monthly average loading limits in defendants' Permit control the total pounds of effluent discharged per day into the Pagan River.

SAV restoration. Nutrient loadings discharged into the Pagan River contribute to nutrient loadings in the James River, and ultimately the Chesapeake Bay. Accordingly, any excess discharges into the Pagan River may affect both the James River and the Chesapeake Bay, and would hinder the efforts of several states and the federal government to reduce nutrient loadings into the Chesapeake Bay.

(1) Phosphorus

Phosphorus is discharged into the Pagan River from point sources, such as wastewater treatment plants and storm water drains, and nonpoint sources, such as run-off from fertilized fields, septic systems, and marinas. Phosphorus also comes from sources within the Pagan River, such as decomposed oyster shells, plants, and the soil. Defendants' total loadings from Permit exceedances for phosphorus from December, 1991, through February, 1997, were approximately 79% of the phosphorus entering the Pagan River.[12] During that same period, phosphorus loadings from nonpoint sources were approximately 11.1% of the phosphorus entering the Pagan River. The Town of Smithfield Wastewater Treatment Plant, the only other major point source at the time, had phosphorus loadings comprising approximately 1.4% of the phosphorus entering the Pagan. The loadings were not significant from other minor point sources. For the James River, phosphorus loadings attributable to defendants' Permit exceedances accounted for approximately 9% of total point-source phosphorus loadings to the James River.

The Chesapeake Bay Program has designated the Pagan River and lower James River as severely stressed with regard

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[12] Defendants' total loadings (including allowed discharges and violations) were approximately 87% of phosphorus entering the Pagan River during this time period. Although the phosphorus limit in the Permit did not take effect until January 3, 1992, it is unlikely this fact would change the percentage of phosphorus entering the Pagan River due to defendants' exceedances of their Permit.

to phosphorus. Clearly defendants have contributed to this condition, since 79% of the phosphorus loadings to the Pagan River are a result of defendants' Permit exceedances. Throughout the Pagan River, phosphorus concentrations in the river exceed the .01 and .02 phosphorous goals for SAV restoration established by the Chesapeake Bay Program. Data for phosphorus concentrations show, however, that the phosphorus concentrations increase as one approaches Outfall 002 from the mouth of the river and peak in the vicinity of Outfall 001. As phosphorus causes eutrophication, particularly in lower salinity areas of the river where defendants were discharging, defendants' Permit exceedances for phosphorus potentially stimulated *more* primary productivity when they added *more* phosphorus to the river. Based on loadings estimates and water quality data, water quality concentrations in the Pagan River are therefore strongly influenced by discharges from defendants' Outfalls, and peak concentrations of phosphorus in the Pagan River are attributable to defendants' Permit exceedances. Thus, defendants' phosphorus violations had a detrimental ecological effect on the river, as they significantly contributed to the large phosphorus concentrations in the Pagan River, and these concentrations exceed the goals for SAV restoration.

(2) TKN and Amenonia

The total nitrogen concentrations in the river exceed the .15 nitrogen goal for SAV restoration established by the Chesapeake Bay Program throughout the river. From December, 1991, through February, 1997, defendants' ammonia and TKN violations resulted in a minimum of 1% additional nitrogen entering the Pagan River.[13] Since the TKN and ammonia violations contributed excess nitrogen to the Pagan River, they contributed in part to the eutrophication of the river. Furthermore, the ammonia violations create a

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[13] Defendants' nitrogen loadings comprised approximately 63% of the nitrogen entering the Pagan River during this time period.

potential for toxicity, and the TKN violations can be an indicator of problems at a wastewater plant. Based on the STORET data presented at trial,[14] concentrations of nitrogen increase near Outfall 002 and peak in the vicinity of Outfall 001, just like the phosphorus concentrations. Accordingly, there is sufficient evidence that defendants' ammonia and TKN violations contributed to the high nitrogen concentrations in the Pagan River, which exceed the nitrogen goal for SAV restoration established by the Chesapeake Bay Program.

(3) Impact of Nutrient Discharges

The Pagan River and neighboring rivers and streams exceed SAV restoration goals, and the entire Chesapeake Bay Basin has been designated an SAV-impacted area by the Chesapeake Bay Program. However, according to the STORET data comparison of the Pagan River and neighboring estuaries during December, 1991, through February, 1997, the concentrations of nutrients, such as phosphorus and nitrogen, and of fecal coliform, are higher in the Pagan River than the neighboring estuaries. There is evidence that the Pagan River is eutrophic. First, the STORET water quality data and the eutrophication index prepared for the EPA's Office of Research and Development show that the Pagan River scores a 5 on a scale of 1 to 5, with 5 being the most eutrophic. Second, Dr. Jeffrey B. Frithsen and Dr. William A. Richkus, the United States' experts at trial in estuarine ecology and fisheries biology, respectively, presented credible testimony that the Pagan River is eutrophic, as evidenced in part by the fact that there was no SAV in the Pagan River and the benthic communities showed eutrophication.[15]

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[14] The STORET is a water quality database that the EPA maintains and to which states submit information.

[15] Defendants' water quality expert, Edwin L. Barnhart, primarily dealt with freshwater systems, and he is not an expert in marine ecology,

In light of the STORET data's pattern of concentrations in the Pagan River for phoshorus and nitrogen, and defendants' excessive loadings reported in their DMRs, it is clear that defendants' Outfalls are the major source of nutrients in the river from December, 1991, through February, 1997, particularly phosphorus. Although it is unclear whether there would be no eutrophication and restoration of SAV in the Pagan River, if defendants were in compliance with the phosphorus and nitrogen limitations in their Permit, defendants' compliance would bring the Pagan River closer to meeting the goals for SAV restoration set by the Chesapeake Bay Program.

Defendants are not the sole cause of the degradation and eutrophication to the river, but their exceedances of the phosphorus, TKN, and ammonia limits clearly contributed to the degradation and eutrophication of the Pagan River and connected waters, such as the James River. The Pagan River would have been less eutrophic from December, 1991, through February, 1997, had defendants met their Permit limits for these nutrients. Defendants' pollutant loadings affected water quality and impaired biological resources, including SAV and benthic communities, which participate in metabolic activities of the estuaries and serve as food for fish. No significant stands of SAV were present in the Pagan River, and this is primarily caused by nutrient enrichment. There is limited fish spawning in the river, and commercial and recreational fishing, crabbing, and shellfish harvesting are also limited in the Pagan River. Accordingly, both the

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fisheries biology, or environmental microbiology. The court finds the United States' experts more credible regarding the effects of defendants' phosphorus, ammonia, and TKN violations on the Pagan River, James River, and the Chesapeake Bay. Defendants' Permit exceedances increased loadings, which resulted in increased concentration of nutrients in the Pagan River, which contributed to eutrophication.

overall environment and human use have been affected by the eutrophication and degradation of the river, to which defendants significantly contributed with their Permit violations.

(b) Fecal Coliform

Fecal coliform is an easily measurable organism which serves as an indicator of possible disease-carrying pathogens in a body of water. The purpose of the fecal coliform standard is to prevent public illness from waterborne diseases, such as intestinal infections, and water-washed diseases, such as skin, ear, and eye infections, caused by swimming in contaminated water. Although fecal coliform levels in the Pagan River indicate a public health risk, they are not entirely accurate indicators of pathogens present in the river, as some pathogens die quicker than fecal coliform, and a few may survive longer than fecal coliform. From December, 1991, through February, 1997, microbiological pollution based on fecal coliform levels in the Pagan River was severe in the upper reaches of the river, and moderate in the lower reaches of the river. When microbiological pollution exists, and fecal coliform concentrations are high, there is a risk of illness for people who come in contact with the river during contact recreation, such as swimming and water skiing, and for those who eat foods in contact with the water, such as shellfish. Due to the fecal coliform contamination of the Pagan River, direct harvesting of oysters is prohibited in the river, and direct contact recreation is discouraged.

Defendants' effluent included fecal matter from hogs, as well as humans, namely the approximately 3,000 employees working at the plants each day. Defendants' exceedances for the total maximum daily limit for fecal coliform were in many cases substantially over the limit. Although defendants suggest the other major point source in the area, the Town of Smithfield's wastewater treatment plant, is a more significant source of fecal coliform, combined flows from Outfalls 001

and 002 averaged over 2.5 million gallons per day, while the flows of the Town of Smithfield averaged less than .5 million gallons per day. In addition, based on flow, fecal coliform levels coming from defendants were five times the levels coming from the Town of Smithfield. Unlike defendants, the Town of Smithfield did not violate its permit limits for fecal coliform from December, 1991, through February, 1997. Furthermore, since extensive expanses of marsh and forest bordering most of the Pagan serve as buffers and filters between nonpoint sources and the river, the court also does not find nonpoint sources to be significant sources of fecal coliform, when compared to defendants' fecal coliform discharges from December, 1991, through February, 1997. Nonsource polluters. such as the housing and commercial units in the Town of Smithfield, were also not major polluters because 94% were on public sewer service.

Although they are unquantifiable, loadings of fecal coliform from defendants' violations are significant. Dr. Wesley O. Pipes, the United States' trial expert in environmental microbiology, concluded that several of defendants' fecal coliform violations were caused by their failure to disinfect properly their effluent. Data for fecal coliform concentrations in the Pagan River follow the same general pattern as the nutrients, as the concentrations increase near Outfall 002 and peak in the vicinity of Outfall 001. Although defendants are not the only source of fecal coliform in the Pagan River, their Permit exceedances significantly contributed to the microbiological contamination of the Pagan River, and further delayed direct harvesting of shellfish and safe direct contact recreation in the river.

(c) Other Effluents

With regard to the other effluent violations of the Permit, the evidence showed there were potential toxic effects from defendants' chlorine and cyanide violations, and defendants'

oil and grease violation. Defendants' TSS violations potentially affected water clarity, which shields sea grasses and other primary producers from sunlight. Such violations also make the river less appealing to humans. Defendants' pH violations potentially caused acidic or alkaline conditions, which would affect the toxicity of the effluent.

iii. Conclusion

In conclusion, based on the credible testimony and evidence presented at trial, most of defendants' Permit discharge exceedances clearly had a severe and significant impact on the water quality of the Pagan River, in light of their frequency and severity. The harm to the environment and the risk to human health caused by defendants' numerous effluent limit violations are serious, and will be considered by this court when assessing the appropriate penalty.

Counts V-VII: Records and Reporting Violations

Although 164 days of violation for untimely reports, 15 days of violation for submission of false reports, and 884 days of violation for failure to maintain or destruction of records, may not be considered "serious" violations by some courts, since they were not done by defendants in "bad faith," *see Laidlaw Envtl. Serv.*, 956 F.Supp. at 603 ("monitoring violations . . . not considered serious unless they are found to have been in bad faith"), or because they did not directly harm the environment, *id.* ("Reporting deficiencies do not produce the type of direct environmental impact which is the primary purpose behind the [Act]") (citations omitted), such violations do impact the effectiveness of the self-reporting scheme set up by the Act.

When a permittee falsifies DMRs, fails to maintain supporting records, or destroys records, the permittee may be covering up serious violations of effluent limitations. Thus,

the court cannot assume that violations of monitoring and reporting requirements in a permit are trivial. Since the Clean Water Act relies on self-reporting of permittees, such violations undermine the Act and are considered serious by this court, despite the fact that they are not discharge violations. With regard to the late reports, the violations are not as serious as the other violations of the reporting requirements, but they are still problematic.

2. Economic Benefit (if any) Resulting from Violations

Clearly, "[v]iolators should not be able to obtain an economic benefit vis-a-vis their competitors due to their noncompliance with environmental laws." *Powell Duffryn*, 913 F.2d at 80. Courts use economic benefit analysis to level the economic playing field and prevent violators from gaining an unfair competitive advantage. The analysis provides an approximation of the amount of money a company has gained over its competitors by failing to comply with the law. Since it is difficult to prove the precise economic benefit to a polluter, a reasonable approximation of economic benefit is sufficient.

For their phosphorus discharges, defendants did not have a treatment system at either plant that could remove phosphorus, but they could have achieved compliance in 1992 by installing a chemical addition system at the dissolved air flotation system, with a second chemical addition point for ferric chloride at the final clarifier, and by instituting source control within the plant. Such treatment systems were installed four years later at Smithfield Packing in January, 1996, in anticipation of defendants' connection to the Hampton Roads Sanitation District ("HRSD") system. Although similar treatment systems were never installed at Gwaltney, it is likely they would be more expensive at Gwaltney, based on an estimate prepared by defendants' consultant, CH2M Hill, and a prior estimate by defendants'

own expert, J. Willis Sneed, an engineer with Wells Engineering Environmental, Inc. In both estimates, the installation cost was higher for Gwaltney than for Smithfield Packing. Nonetheless, the annual operation and maintenance of the Gwaltney system would have resulted in a profit for defendants each year, had defendants installed the treatment system at Gwaltney. The installation of such equipment for treatment of phosphorus was not inconsistent with the hookup to HRSD, as it could have been used as part of an effective pre-treatment system upon connection to HRSD. Garry E. Stigall, the United States' expert in sanitary engineering, admitted that his estimates of the cost of compliance were minimum estimates, based on installing just enough equipment to get by, and that actual costs would likely exceed his estimates.[16]

The credible testimony and evidence was that defendants also had insufficient oxygenation in the aerobic lagoons. This lack of aeration most likely caused defendants' violations of the ammonia and TKN limits, and the pH and fecal coliform limit violations in 1994. Since there was also testimony that defendants could not have been consistently meeting their TKN or fecal coliform limits between 1991 and 1994, they should have installed additional aeration capacity at both plants in October, 1991. Although some aerators were installed at both plants in 1994, more aerators were required at Smithfield Packing to ensure compliance with the ammonia limit.

The court acknowledges there are various methods for calculating defendants' economic benefit gained from

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[16] Defendants do not get credit for past or future money spent on HRSD user fees, sewer surcharges, or other equipment installed at Gwaltney to enable them to connect to HRSD, as the court finds based on the credible evidence and testimony, that the user fees and surcharges are neither avoided or delayed costs, and such equipment was not necessary for a facility upgrade to bring defendants into compliance.

noncompliance. However, based on the credible testimony,[17] the court finds the avoided and/or delayed cost of compliance, and the weighted average cost of capital (WACC)[18] as a discount/interest rate in the economic benefit calculation, to be both the best and the appropriate method to determine how much money defendants made on the funds they did not spend for compliance. When a company delays or avoids certain costs of capital and operations and maintenance necessary for compliance, the company is able to use those funds for other income-producing activities, such as investing that money in their own company.

Robert Harris was called as an expert in financial analysis by the United States. Using Harris' WACC rate of approximately 11.83% to 12.49% for Smithfield Packing and Gwaltney of Smithfield, the court agrees with Harris' conclusion that defendants gained an economic benefit of approximately $4,253,070, or $4.2 million, from avoided and delayed compliance.[19] Thus, it is clear that defendants saved a substantial amount of money by delaying the construction of equipment, or avoiding the purchase and installation of equipment, that would have allowed them to comply with their Permit and the Clean Water Act.

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[17] The court was more persuaded by the testimony of the United States' economic benefit expert, Robert Harris. The court rejects in most part the testimony of defendants' experts Robert H. Furhman and A. Lawrence Kolbe, and particularly the risk-free rate analysis.

[18] The WACC is the average return a company expects to make for its investors, in order to maintain its current level of investors and its current level of business operations. Tr. at 366-67.

[19] Even if the errors identified by defendants in Harris' calculations were remedied (other than his failure to use the risk-free rate), there is only a slight decrease in his estimate of defendants' economic benefit of noncompliance. This difference, of approximately 4%, is not significant.

3. History of Such Violations

In determining the "history of such violations," courts consider the duration of defendants' current violations, whether defendants have committed similar violations in the past, and the duration and nature of all of the violations, including whether the violations are perpetual or sporadic. See *United States v. City of San Diego,* No. CIV. 88-1101-B, 1991 WL 163747 (S.D.Cal. Apr.18, 1991); *Student Publ. Interest Rersearch Group of New Jersey, Inc. v. Hercules, Inc.,* 19 Envtl.L.Rep. 20903, 20906 (D.N.J.1989). The Permit violations in this case, especially the effluent limit violations, are of significant duration and are perpetual. There were violations of the effluent limits and the monitoring and reporting requirements throughout the six-year period covered by this lawsuit, from 1991 through 1997. Furthermore, this is not the first time defendants have been sued for violations under the Clean Water Act. *See Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield,* 611 F.Supp. 1542 (E.D.Va.1985) (lengthy four-year subsequent history omitted). Accordingly, defendants have a history of violations, which will be taken into account in determining the appropriate penalty.

4. Good-faith Efforts to Comply with Applicable Requirements

Whether defendants took any actions to decrease the number of violations or made efforts to mitigate the impact of their violations on the environment must be also considered when the court is determining the appropriate penalty for permit violations. *See, e.g., Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co., Inc.,* 786 F.Supp. 743, 752 (N.D.Ind.1992); *Roll Coater,* 21 Envtl. L. Rep. at 21076-77.

a. Counts I-IV: Effluent Limit Violations

In their favor, defendants will soon fully connect to the HRSD system in 1997,[20] with the result that defendants will have zero discharge into the Pagan River in the *future*. Thus, defendants do get some credit for their steps. although slow, that they have taken to eliminate their *future* effluent violations, regardless of whether they elected to connect to HRSD for environmental or economic reasons, or both.[21] *But cf. Powell Duffryn*, 913 F.2d at 81 (reversing district court's reduction of penalty on basis that defendant attempted to comply with state, and holding that defendant's actions did not rise "to the level of good faith"). *See generally Universal Tool*, 786 F.Supp. at 752 (consideration given to record showing that defendant worked diligently with the state department).

However, the court must also consider whether there were any other good-faith efforts by defendants to comply with the applicable requirements in the Permit from 1991 until the HRSD connection. Although defendants did agree on July 15, 1991, to connect to HRSD soon after it became available, there was little to no evidence at trial that defendants made any efforts to facilitate their connection to HRSD, or to treat their wastewater and/or decrease their discharge of pollutants

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[20] At the time of trial, defendants had not yet completed their HRSD connection. However, such full connection apparently is imminent. In any event, the court reiterates that the liability and resulting penalty in this case are for *past* discharges, pre-dating the HRSD connection.

[21] In May, 1991, defendants' consultant CH2M Hill advised defendants to connect to HRSD, finding that "the overall most cost-effective alternative for Smithfield Foods, when considering both plants together, is to discharge to HRSD." Pl.Ex. 21 at SF403218. Also, the State Water Control Board advised defendants that the HRSD connection would aid the Town of Smithfield with its sewer problems, provide sewage service to Isle of Wight County, and result in a much-needed upgrade of the Nansemond Wastewater Treatment Plant. *See* Tr. at 491-92.

in the interim. Defendants were granted two extensions to decide whether to connect to HRSD. The HRSD connection was further delayed when the sewer line was relocated closer to defendants' facilities. It is undisputed that defendants have spent a considerable amount of money to connect to HRSD, but in this document-intensive case, defendants could not point to any document indicating *they* took any steps to facilitate or speed the connection with HRSD.[22]

Defendants could have curtailed production to achieve compliance with the effluent limits in the interim, as they had done prior to 1991. After 1991, however, defendants reduced the number of times they cut back production. By 1995, they were no longer cutting back on production to achieve compliance. Defendants apparently had an incentive to maintain or increase the level of production, and their discharge of pollutants, until the HRSD connection. According to defendants, the Commonwealth's Special Orders took precedence over their Permit, and they were in compliance, if they agreed to connect to the HRSD system within three months of availability, regardless of the date the connection became available or the amount of phosphorus, carbonaceous biological oxygen demand ("CBOD"), ammonia-nitrogen, and cyanide they discharged.[23] Other

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[22] At trial, the only document to which defendants pointed was defense exhibit 50, a letter dated May 23, 1996, from James R. Borberg, General Manager of HRSD, to W. Bidgood Wall, Jr., of the state board, regarding HRSD's request for lost revenue from the DEQ due to the delay in the Smithfield Foods-HRSD connection. In the letter, HRSD attributes the delay to the DEQ's failure to enforce its consent order with Smithfield regarding the HRSD connection. Matters between the HRSD and the state board are not relevant, as defendants must show that *they—not HRSD—objected to the delay* and that they *took steps to facilitate the connection.* No such documents exist in the record of this case.

[23] In its May 30, 1997 Opinion, the court held the Special Orders did not take precedence over the Permit. At trial, Richard Burton, the former Director of the State Water Control Board and then the DEQ,

than agreeing to the HRSD connection, defendants did not attempt to comply in the interim with the phosphorus, CBOD, ammonia and cyanide limits in the Permit, such as facility upgrade or a decrease in production, since they apparently believed they could discharge as much and as frequently as they wanted into the Pagan River under the terms of the Special Orders.

Defendants also claim they acted in good faith since they often engaged consultants, such as in the fall of 1994. However, this expert advice was often ignored and the implementation of suggestions was often delayed. For example, serious deficiencies in the operation and maintenance of the treatment plant identified by Larry Lively in his internal "audit" of defendants' wastewater treatment plants in 1990,[24] were not completely remedied by defendants. Moreover, in 1991, although HRSD, the DEQ, and defendants' consultant informed defendants that there was insufficient oxygen in the aeration lagoons to remove nitrogen, defendants did not regularly record the oxygen levels in the aeration lagoons. Insufficient oxygen was supplied to defendants' aerobic lagoon as early as March, 1991, with the result that defendants violated their TKN and ammonia limits in the Permit.

Defendants' insufficient and inadequate efforts at compliance are also evidenced by the credible testimony and

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testified that the Commonwealth did not intend the consent order to be a modification of the Permit, and he acknowledged the express language in the May, 1991 Special Order that "nothing herein shall be construed as altering, modifying, or amending any term or condition contained" in defendants' Permit. Tr. at 495-96. Moreover, Burton testified that "the order speaks for the Commonwealth"—he did not maintain that it spoke for or bound the EPA. Tr. at 504.

[24] At this time, Lively was a project engineer at defendants' Kinston, North Carolina plant. He was later transferred to work at defendants' wastewater treatment plants in Smithfield, Virginia, as a director of environmental affairs.

evidence that defendants' wastewater treatment plants were not properly operated and maintained. When Lively was acting as defendants' director of environmental affairs, Terry Rettig was the chief operator of defendants' wastewater treatment plants. Lively decided to allow Rettig to run the treatment plant "on his own," with little supervision by Lively. From 1990 until Rettig was transferred out of the plant, Lively and Carl Wood, a vice president of Smithfield Foods, allowed Rettig to perform work for several outside wastewater treatment plants, even though he was the only licensed operator at defendants' plants. By 1993, Rettig was often absent from defendants' plants. His absence was exacerbated in 1993 by defendants' decision to cut costs by leaving the wastewater treatment plant unsupervised for one shift a day, from 4 p.m. to 6 a.m. During 1992 and 1993, when Lively began to spend significantly less time at defendants' facilities, there was no one other than Rettig supervising the wastewater treatment plants. Although Lively provided the second signature on each of the DMRs prepared and signed by Rettig, Lively never spot-checked the bench sheets from which the information in the DMRs was drawn.

Defendants were notified in May, 1994, that the DEQ was investigating Rettig with regard to his outside activities at the other facilities, and his use of defendants' laboratory to perform work for outside clients. When an interview with the DEQ was scheduled in June, 1994, to discuss the allegations, Rettig failed to attend. Despite these facts, defendants did not conduct any investigation of Rettig or of their own laboratory records. At a second meeting held on July 21, 1994, Rettig could not locate the pre-1994 records requested by the DEQ, which were held in boxes in a storage room to which only Rettig, Diane Carson (then the chief of the wastewater treatment laboratory), and another employee, Henry Morris, had keys. Neither Lively nor Wood asked Carson or Morris if they knew the location of the records, and Carson declined to inform defendants that she saw Rettig dumping several boxes,

which may have contained the records, into a dumpster at defendants' plant in the summer of 1994. When bench sheets for the 1992-1993 time frame were recovered by Carson in August, 1995, they showed that the DMRs submitted by defendants to the DEQ were falsified by Rettig for certain months. Thereafter, Rettig was asked to resign, and this information was turned over to the DEQ. Although Rettig's destruction of the documents was against company policy and in direct contravention of Lively's order to get the documents, defendants did not take all of the necessary steps to investigate the disappearance of the documents, or prevent such destruction in the future. Even after it was discovered that Rettig falsified data on the DMRs, defendants did not require spotchecks of bench sheets or laboratory reports. Defendants have submitted at least three inaccurate DMRs since Rettig's departure from the company.

Inadequate training of wastewater treatment plant employees was another problem at defendants' plants, which likely contributed to their Permit violations. For example, problems at the plant, such as solids not being removed by the skimmer at the dissolved air flotation unit at Smithfield Packing, and the ferrie chloride addition tank running out of ferric chloride, were likely attributable to inadequately trained or supervised staff, or short-staffing. When Rettig was the chief Operator of defendants' plants, he was the only treatment plant or laboratory employee who knew the Permit limits. In August, 1994, Carson succeeded Rettig, and was made operations manager for the wastewater treatment plant, despite the fact that she did not have the correct license to operate the plant and had never supervised the operation of such a plant before. Despite Carson's lack of proper qualifications, she did take steps to ensure that defendants' employees were made aware of the Permit limits after August, 1994. Carson instituted several policies and procedures to facilitate compliance and the reporting of Permit violations. She developed "flag sheets," which

identified potential violations, and "problem sheets," for use by employees in addressing specific problems at the plants. It was not until April, 1997, however, that defendants issued a policy on reporting Permit violations.

b. Counts V—VII: Records and Reporting Violations

Although there is no evidence of bad faith on the part of defendants with regard to the monitoring and reporting requirements in Counts V through VII,[25] or that anyone other than Rettig was involved in the falsification and destruction of documents, defendants' efforts at compliance could have been more vigorous. They should have had safeguards to prevent delays in reporting, falsifications, or destruction of records. To prevent delays, defendants could have employed another plant operator or supervisor who could perform the record-keeping and reporting requirements in the absence of Lively, or the person normally in charge of the records. To prevent falsification, defendants could have instituted random spot-checking of reports. To prevent the problem of missing records from destruction of such, defendants could have retained copies of these documents and placed them in a different and secure location. Accordingly, defendants are entitled to some credit for their lack of bad faith for these violations, but they are not blameless, as they failed to institute proper safeguards to ensure compliance with the Permit in this regard.

5. *Economic Impact of the Penalty on the Violator*

Penalties are not limited to the economic benefit derived from noncompliance, as such a penalty would make the

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[25] For example, with regard to the document destruction alleged in Count VII, defendants contend there were good-faith efforts to comply, as Lively ordered Rettig to retrieve the records from storage on July 21, 1994, and Rettig's destruction of those documents was in direct contravention of defendants' records retention policy.

violator no worse off than complying in a timely manner. *Hercules*, 19 Envtl.L.Rep. at 20904 (citing *Gwaltney*, 611 F.Supp. at 1557); *Tull v. United States*, 481 U.S. 412, 422-23, 107 S.Ct. 1831, 1838, 95 L.Ed.2d 365 (1987) (economic gain and restoration of the status quo not the only basis on which penalties should be awarded under the Clean Water Act; penalties are designed to punish violators for their noncompliance and serve the goals of retribution and deterrence). The main purpose of the penalty is to deter the violator and others from committing future violations.

In accordance with these principles, the court is required to consider the economic impact of the penalty on the violator. In doing so, the court may consider appropriate economic indicators of a company's financial status. One such indicator is the stockholder's equity, which is the net of a company's total assets minus total liabilities, and which gives a good indication of the size of the company. Based on its financial statements from 1992 through 1996, Smithfield Foods is a large and financially healthy company, as its total stockholders' equity is over $240 million. As presented by the United States at trial, the $4.2 million of economic benefit represents only 1.7% of defendants' stockholders' equity; and a $16 million penalty, representing 6.4% of defendants' stockholders' equity, would have a more material, but not detrimental, effect on the company's financial condition.[26] Accordingly, the government asks for a penalty of $20 million.

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[26] These figures and conclusions derive from the credible expert testimony of Robert Harris. *See* Tr. at 389-90. Although the court refused the evidence regarding the $16 million in economic benefit gained by defendants from "wrongful profits," because this opinion had not been properly given to defendants during pre-trial discovery, the court agrees that a $16 million penalty would have a material, but not detrimental, financial effect on defendants. However, the court itself makes this conclusion based upon defendants' financial statements and other evidence in the case.

6. Other Matters as Justice May Require

For this factor of Section 309(d), courts may either increase or decrease the penalty in light of other matters, such as bad-faith conduct of the violator, a violator's attitude toward achieving compliance, and the violator's ability to comply with the Act. *See Powell Duffryn*, 720 F.Supp. at 1167, *aff'd in part, rev'd in part on other grounds*, 913 F.2d 64; *United States v. Velsicol*, 8 Envtl.L.Rep. 20745, 20748 (W.D.Tenn.1978); *Gwaltney*, 611 F.Supp. at 1561. The court has already commented on defendants' attitude; [27] and the court has found no bad faith.[28] Thus, these two factors seem to cancel each other out. Furthermore, the court is of the opinion that defendants could have complied by reducing production or updating equipment.[29]

One factor the court has not addressed is defendants' assistance to the Town of Smithfield to connect to the HRSD system. The Town may not have been able to connect to HRSD, if defendants had not elected to connect to HRSD, and given assurances of their continued business presence in the town. The court will also consider the fact that certain DEQ reports showed that defendants' facilities were in compliance, and thus defendants thought they were in compliance, at least with state requirements.

B. Penalty Calculation

For the 6,982 total days of violation of defendants' Permit, the court's penalty may not exceed the statutory maximum, $174.55 million. However, after calculating the statutory maximum penalty,[30] the court must then determine the

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[27] *See supra* note 8.

[28] *See supra* Part III.A.4.b.

[29] *See supra* Part III.A.2. and III.A.4.a.

[30] *See supra* Part II.

methodology to use in assessing an appropriate civil penalty, after consideration of the Section 309(d) factors. Some courts use the "top-down" method of penalty calculation, in which the court begins the penalty calculation at the statutory maximum, and adjusts downward considering the Section 309(d) factors. *See, e.g., Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir.1990); *Avatar Holdings,* 1996 WL 479533, at *5; *Hawaii's Thousand Friends v. City & County of Honolulu,* 821 F.Supp. 1368, 1395 (D.Haw.1993); *Universal Tool,* 786 F.Supp. at 746; *Roll Coater,* 21 Envtl.L.Rep. 21073. Other courts use the "bottom-up" method of penalty calculation, in which the court begins the penalty calculation using defendants' economic benefit of noncompliance, and adjusts upward or downward considering the Section 309(d) factors. *See, e.g., Laidlaw Envtl. Serv.,* 956 F.Supp. at 603; *United States v. Municipal Authority of Union Township,* 929 F.Supp. 800, 806 (M.D.Pa.1996); *Student Pub. Interest Group of New Jersey, Inc. v. Monsanto Co.,* No. CIV.A.83-2040, 1988 WL 156691, at *16 (D.N.J. Mar 24, 1988); *Gwaltney,* 611 F.Supp. at 1557. As the statute does not require either the "top-down" or the "bottom-up" method, the court exercises its discretion and elects to use the "bottom-up" method when calculating the appropriate penalty for defendants' violations of their Permit.

In accordance with the "bottom-up" method of penalty calculation, the court will start at defendants' estimated economic benefit of noncompliance, $4.2 million, and will adjust upward or downward considering the other factors set forth in Section 309(d), as already detailed and reviewed in this Opinion, namely: seriousness of the violation; history of violations; good-faith efforts to comply with the Permit; economic impact of penalty on defendants; and other matters as justice may require. The economic impact of the penalty on defendants and other matters as justice may require apply equally to all counts. The seriousness of the violations,

history of violations, and good-faith efforts to comply, however, apply in different degrees with regard to the counts.

In summary, there are 5,919 days of violations in Counts I through IV for defendants' effluent limit violations. Most of defendants' violations were both frequent and severe, and had a significant impact on the environment and on the public, and thus in total their violations of the effluent limits were extremely serious. Defendants also have a lengthy and a persistent history of effluent violations. While there were some good-faith efforts made by defendants to eliminate their discharge *in the future* by connecting to HRSD, and they indicated they believed they were in compliance with some of the effluent limits once they agreed to connect to HRSD, clearly defendants could have done more to facilitate the HRSD connection or reduce their discharges in the interim.

Defendants' had 164 days of violation in Count V for late reporting, which included a toxic management report that was 106 days late, and a missing number for average loading of TKN on a September, 1994 DMR turned in 58 days late. These violations are moderately serious, but were not made in bad faith. However, defendants should have instituted safeguards to prevent such violations.

For defendants' 15 days of violation in Count VI for submission of inaccurate DMRs, the violations are extremely serious. While Rettig falsified the reports, both he and lively signed them, stating they were accurate. Defendants are commended for turning the altered records over to the DEQ, once the falsifications were discovered. Nonetheless, defendants' efforts to comply here were insufficient; defendants could have instituted safeguards, such as using bench sheets or laboratory reports to spot-check DMRs.

There are 884 days of violations in Count VII for failure to maintain or destruction of records. These violations are also extremely serious. Although there could be effluent limit or

other violations reflected in these documents, the contents of all of the destroyed documents will never be known. Rettig alone destroyed the documents, in direct contravention of company policy and an order from his immediate supervisor to find and produce the records. Although there is no evidence of bad faith by defendants, sufficient good-faith efforts were not made by defendents, as they did not have adequate safeguards to prevent such destruction.

Accordingly, the court FINDS that the appropriate civil penalty for defendants' Permit violations is $12,600,000. Defendants are jointly and severally liable for this penalty. The Clerk shall enter judgment in this amount for plaintiff. Further, plaintiff shall submit to the court, within thirty (30) days, a proposal for the allocation of this penalty, with a specific focus on the feasibility of directing all, or part of, the penalty toward the restoration of the Chesapeake Bay and its tributaries, namely the James and the Pagan Rivers. The court retains limited jurisdiction of this matter in regard to such proposal.

The Clerk is DIRECTED to send a copy of this Opinion to counsel for the parties.

It is so ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT,
E.D. VIRGINIA,
NORFOLK DIVISION

Action No. 2:96cv1204

UNITED STATES OF AMERICA,
Plaintiff,

v.

SMITHFIELD FOODS, INC., SMITHFIELD PACKING COMPANY, INC., AND GWALTNEY OF SMITHFIELD, LTD.,
Defendants.

May 30, 1997.

OPINION

REBECCA BEACH SMITH, District Judge.

This matter is before the court on (1) the Motion to Join the Virginia State Water Control Board and the Virginia Department of Environmental Quality as Parties to this Action filed by Smithfield Foods, Inc., and its subsidiary companies Smithfield Packing Co., Inc., and Gwaltney of Smithfield, Ltd. (hereinafter "defendants" or "Smithfield"), on March 14, 1997, and (2) the Motion for Partial Summary Judgment on Liability and Section 309(g)(6) Issues filed by the United States on March 10, 1997. For the reasons stated from the bench, the court DENIES defendants' Motion to Join the Virginia State Water Control Board and the Virginia Department of Environmental Quality as Parties to this Action. For the reasons stated below, the court GRANTS the United States' Motion for Partial Summary Judgment on Liability and Section 309(g)(6) Issues.

I. Factual and Procedural History

Smithfield Foods, Inc. is a publicly-held Delaware corporation that owns and operates two pork processing and packing plants in Smithfield, Virginia, namely Smithfield Packing (a Virginia corporation) and Gwaltney (a Delaware corporation), that discharge wastewater. The wastewater generated by the Smithfield Packing and Gwaltney facilities is treated by two wastewater treatment plants operated by Smithfield Foods, Outfalls 001 and 002. The discharge through Outfall 001 generally originates from the Smithfield Packing plant, while the discharge through Outfall 002 generally originates from the Gwaltney plant. Between at least August, 1991, and the present, defendants discharged treated wastewater from Outfall 001 into the Pagan River, a tributary of the James River. Treated wastewater was also discharged by defendants into the Pagan River through Outfall 002 from at least August, 1991, until June, 1996, when Outfall 002 was connected to the Hampton Roads Sanitation District ("HRSD") system.

A. The Clean Water Act

The Clean Water Act ("Act") was enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101, 33 U.S.C. § 1251. In order to achieve these goals, Section 301(a) of the Act prohibits the discharge of pollutants into the waters of the United States by any person except as authorized by specific provisions of the Act. 33 U.S.C. § 1311(a). Section 402, one of the specified sections, establishes the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342. Under the NPDES program, the Administrator of the Environmental Protection Agency ("EPA") may issue permits to point sources[1] authorizing the discharge of pollutants in

[1] A "point source" is defined as "any discernable, confined and discrete conveyance, from which pollutants are or may be discharged." Section 502(14), 33 U.S.C. § 1362(14).

accordance with specified limitations and conditions. Section 402(a), 33 U.S.C. § 1342(a). Section 301(b) of the Act authorizes the EPA to establish nationally applicable effluent limitations for point sources, 33 U.S.C. § 1311(b), which are incorporated into the discharger's permit along with any other requirements established pursuant to the Act. Section 402(a), 33 U.S.C. § 1342(a).

Although the primary responsibility for the administration of the Act lies with the Administrator of the EPA, Section 101(d), 33 U.S.C. § 1251(d), Congress has stated that the participation of the public must be provided for, encouraged, and assisted, *see* Section 101(e), 33 U.S.C. § 1251(e), and that the "primary responsibilities and rights of States" to control pollution and manage natural resources must be recognized, preserved, and protected. Section 101(b), 33 U.S.C. § 1251(b). Consequently, Section 402(b) of the Act allows a state to become involved in the administration of the NPDES program for discharges within that state's boundaries. 33 U.S.C. § 1342(b). Congress retained in the EPA, however, "close and continuing oversight and supervision of the state program," including the authority to withdraw EPA approval of the state NPDES program in extreme situations. *United States v. Cargill, Inc.*, 508 F.Supp. 734, 740 (D.Del.1981) (citing Section 402(c)(3), 33 U.S.C. § 1342(c)(3)). Accordingly, while the enforcement provision of the Act, Section 309, 33 U.S.C. § 1319, gives "primary responsibility to the state with an approved NPDES system," it also places "significant authority in the EPA to oversee the state's administration and to step in itself in appropriate situations." *Id.*

Once the EPA determines that it should assume enforcement responsibility with regard to a violator, the EPA may issue an order requiring compliance, "commence a civil action for appropriate relief" pursuant to Section 309(b), 33 U.S.C. § 1319(b), or institute administrative proceedings pursuant to Section 309(g), 33 U.S.C. § 1319(g). Not only may

the EPA pursue injunctive relief, but the Act also provides for civil penalties not exceeding "$25,000 per day for each violation." Section 309(d), 33 U.S.C. § 1319(d).

B. The Permits and Special Orders relating to defendants

In March, 1975, the EPA authorized the Commonwealth of Virginia to issue permits governing the discharge of pollutants into navigable waters within the Commonwealth.

Pursuant to this authorization, the Virginia State Water Control Board ("Board") issued Permit No. VA0059005 ("Permit") to Smithfield on May 13, 1986. The Permit placed various restrictions on the operation of Smithfield's wastewater treatment plants, including limitations on the amount and concentration of certain pollutants in the waste-water. In addition, the Permit required Smithfield to monitor the wastewater discharged from the outfalls, submit Discharge Monitoring Reports ("DMRs") reporting the results of wastewater sampling and analysis, submit the results of annual toxicity testing, and retain all sampling and analysis data for three years. The 1986 Permit imposed stricter total Kjeldahl nitrogen ("TKN") limits on Smithfield than prior permits governing Outfalls 001 and 002.[2]

Pursuant to its authority to promulgate state environmental standards more stringent than those required by federal law, the Commonwealth promulgated its "Policy for Nutrient En-

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[2] The Board imposed "interim limits" for TKN in a Special Order dated May 13, 1986, that were less strict than the limits set forth in the 1986 Permit because "the Board and Smithfield recognize[d] that additional water quality data on the Pagan River would be of benefit in confirming the model prediction" used to set the stricter TEN limits in the 1986 Permit. In return, Smithfield was required to submit water quality data and modeling information to the Board by March 31, 1987. *See* May 13, 1986 Special Order. In an amendment to the May, 1986 Special Order, dated January 25, 1988, the Board extended the deadline for Smithfield's submission of data to October 1, 1988, and set forth a schedule of compliance for the TKN standards

riched Waters" ("Policy"), effective May 25, 1988, which provided for the control of discharges of nutrients from point sources affecting state waters designated "nutrient enriched waters." Va. Admin. Code tit. 9, § 25-40-10 *et seq.* The Policy required the Board to reopen and modify the permits of point sources discharging into nutrient enriched waters to include a monthly average phosphorus effluent limitation of 2.0 mg/l. The Pagan River is designated a "nutrient enriched water." Va. Admin. Code tit. 9, § 25-260-350(17). Because the Policy applied to defendants' facilities, on June 3, 1988, Smithfield filed a petition of appeal in Isle of Wight Circuit Court challenging the 2.0 mg/l standard as not reasonable and practical of attainment.

Notwithstanding Smithfield's appeal, the Board reopened and modified Smithfield's Permit to include the 2.0 mg/l phosphorus limitation on January 4, 1990. The modified January 4, 1990 Permit, which was approved by the EPA, retained the requirements of the 1986 Permit, but added the phosphorus limitation of 2.0 mg/l and required monitoring for total nitrogen. Part I.C. of the Permit included the following "Schedule of Compliance" for the total phosphorus limitations: (1) initiate design of facilities within 30 days after the modification date of the permit; (2) submit plans to the Board within 90 days from # 1; (3) commence construction within 30 days of the Board's approval of the plans; (4) complete construction within 29 months of #3; and (5) achieve compliance with final effluent limitations 30 days after completion of construction. Jan. 4, 1990 Permit, Part I.C., at 3. Smithfield appealed the modified 1990 Permit. Since the new phosphorous limitations were not required in other states, the company considered moving its operations outside of Virginia if forced to comply.

After conducting negotiations with Smithfield, the Board elected to settle the dispute concerning the phosphorus limitations by issuing a Special Order on March 21, 1990. In the

March, 1990 Special Order, the Board first explained the deadlines imposed by the modified 1990 Permit: Smithfield was "required to commence design of treatment works to achieve compliance with th[e] phosphorus limitation on February 4, 1990, and complete design within 90 days thereafter. Smithfield is further required to attain full compliance with the phosphorus limitation by January 4, 1993." March 21, 1990 Special Order at 1.[3] Because Smithfield challenged the schedule of compliance for the phosphorus limitations in Part I.C. as unreasonable and not practicable of attainment, the Board agreed "to defer commencement of the schedule in Part I.C. of the 1990 Permit until December 1, 1990." *Id.* at 2.[4] The Special Order also continued the interim effluent lim-

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[3] In the record, this is the first time "January 4, 1993," is mentioned as the date that Smithfield must attain full compliance with the phosphorus limitation. March 21, 1990 Special Order at 1.

[4] Initially, it was not clear from the March 21, 1990 Special Order whether the Board intended to defer just the *commencement* of the schedule of compliance from February 4, 1990 to December 1, 1990, or if the Board intended to defer the *entire schedule* of compliance, so that full compliance with the phosphorus limitation was not required until several months after January 4, 1993. The court concludes that the Board only deferred the commencement of the schedule, and not the entire schedule of compliance, for several reasons. First, the Special Order clearly states that "[t]he Board agrees to defer *commencement* of the schedule . . . ." March 21, 1990 Special Order at 1 (emphasis added). Second, in the record, this March 21, 1990 Special Order is the first time the date January 4, 1993, is cited as the date of full compliance required by the modified 1990 Permit. *See supra* note 3. While the Board deferred *commencement* of the schedule from February 4, 1990 to December 1, 1990, it did not similarly defer the date of full compliance, January 4, 1993, to a later date. Third, in the subsequent 1992 Permit, the Board included the January 4, 1993 date, and not a later date, for full compliance with the phosphorus limitation. This issue of whether the Board's March, 1990 Special Order deferred the commencement of the schedule, or the entire schedule of compliance, is not in any way dispositive, however, as the court has found that the EPA was not bound by the Board's Special Orders. *See infra* Part II.B.2.

its for TKN. *Id.* The Board noted that "[the remainder of the Permit shall remain in effect pending further action by the Board." IL In return, Smithfield agreed, *inter alia*, to (1) study the available costs and technologies involved in achieving compliance with the phosphorus limitations, (2) study the feasibility of connecting its wastewater system to the HRSD system, and (3) notify the Board by November 13, 1990, whether it intended to connect to the HRSD system. *Id.* at 1-2.

The Board issued an amendment to the March, 1990 Special Order on November 6, 1990. In the November, 1990 Special Order, the Board gave Smithfield until February 15, 1991, a three-month extension, to advise the Board whether it intended to connect to the HRSD system. The Board also agreed "to defer commencement of the schedule" of compliance for phosphorous limitations set forth in Part I.C. of the Permit until March 1, 1991.[5]

On May 9, 1991, the Board issued another Special Order granting an extension to Smithfield. In the May, 1991 Special Order, the Board required Smithfield to notify the Board no later than June 15, 1991, of defendants' commitment "to connect to the HRSD line or to upgrade their facilities to comply with the 2 milligram per liter phosphorus standard." May 9, 1991 Special Order at 2. If Smithfield agreed to connect to the HRSD system, it was required to do so within three months after notification by HRSD that a sewer line was available for the collection of defendants' wastewater. If Smithfield decided not to connect to the HRSD system, it was required to "submit by August 15, 1991, an approvable schedule for upgrading its treatment facilities to comply with all Permit effluent limitations." *Id.*

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[5] Again, while initially it was not clear if the Board agreed to compliance, the court concludes that it intended the former here. *See supra* note 4.

The May, 1991 Special Order also indicated that Smithfield was required to comply with the interim effluent limitations in Appendix A of the Special Order, until it connected to the HRSD system or completed the approved upgrade of its treatment facilities. *Id.* The first part of Appendix A set forth discharge limitations and monitoring requirements for TKN, and the second part stated that "[e]ffluent limitations and monitoring requirements for all other parameters and characteristics shall be those set out in the Permit." *Id.* at App. A. The May, 1991 Special Order also provided that Smithfield must dismiss its challenge to the phosphorus standard in Isle of Wight Circuit Court.[6] At the end of the May, 1991 Special Order, the Board stated that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in VPDES Permit No. VA0059005." *Id.* at 2.

On June 7, 1991, Smithfield notified the Board of its decision to connect its wastewater treatment facility to the HRSD system. Consequently, Smithfield "ceased all attempts to comply with the phosphorus limits by upgrading its treatment facilities" and "instead conduct[ed] studies and cooperat[ed] with HRSD to ensure compatibility of Smithfield's effluent with HRSD's system." Defs.' Br. at x, ¶ 9jj.

In 1991, the Board issued a draft of a new Permit for Smithfield. Part I.B. of the draft Permit retained the schedule of compliance for the phosphorus limitation first included in the modified 1990 Permit; Smithfield was required to achieve compliance with the phosphorus limitation by January 4, 1993. Part I.C. stated that the phosphorus limitation in effect after that date was a monthly average of 21 lbs/day and 2 mg/l. After reviewing the draft Permit, the EPA advised the Board that it had no objection to the issuance of the revised draft Permit. July 25, 1991 Letter from EPA to Board (Defs.'

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[6] The Isle of Wight Circuit Court dismissed Smithfield's action on April 1, 1991, actually predating the May, 1991 Special Order. Defs.' Br. at ix, ¶ 9bb.

Ex. 27). The EPA reminded the Board that "[a]ny additional changes to the draft permit will require EPA review prior to issuance." *Id.*

On October 1, 1991, Smithfield submitted the following comments to the Board regarding Part I, Sections B and C, of the draft Permit:

> Compliance dates of the effluent characteristics and engineering milestones listed in the Part I, Section C tables (pages 6 and 7) cannot be met by Smithfield Foods, Inc. now that we have agreed to abandon the plans to upgrade our existing facilities and[7] tap onto HRSD when it becomes available. Relief from such compliance is not specifically present or is not apparent in the [1991] Consent Order. In view of these factors, Smithfield Foods, Inc. requests that if these compliance dates and milestones are required in the proposed permit, some documentation or letter be provided by the State Water Control Board stating that alternate compliance will be maintained with Smithfield's agreement to connect to HRSD as soon as it becomes available regardless of the time frame in which this occurs.

Oct. 1, 1991 Letter from Smithfield to Board at 3 (Defs.' Ex. 25). The Board responded as follows in a letter dated October 10, 1991:

> The draft permit is a separate document from the current Consent Special Order issued to Smithfield Foods in May 1991. The effluent limitations imposed on two point source discharges from the facility are based on State Water Quality Standards, the Permit Regulation and the revised Pagan River Model presented to the

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[7] In their brief, defendants insert the word "[instead]" between "and" and "tap" when quoting this portion of Smithfield's letter. Defs.' Br. at xi, ¶ 9kk. The word "instead," or a similar word, is not included in the original text of Smithfield's letter.

> Board. The compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations. Any special order agreements relative to compliance with water quality standards, the Permit regulation and associated studies that have been approved by the Board take precedence over the VPDES Permit.

Oct. 10, 1991 Letter from Board to Smithfield at 2, ¶ 3 (Defs.' Ex. 26). The EPA was provided a copy of the Board's letter. See *id.*

On December 23, 1991, the Board staff sent a memorandum to the Executive Director of the Board recommending approval of the proposed 1992 Permit. Dec. 23, 1991 Memorandum Accompanying 1992 Permit (Defs.' Ex. 23). The Board staff indicated that Smithfield "notified the Board that it will eliminate its wastewater discharges to the Pagan River and connect its facilities to the HRSD system when the sewer has been extended to their plant." *Id.* at 2. The staff noted that Smithfield's "discharge is not controversial and is expected to meet the required final effluent limitations" and that it believed "that the future effluent limitations will maintain the Water Quality Standards adopted by the Board." *Id.* at 4.

On January 3, 1992, the Board issued Smithfield's 1992 Permit. Despite Smithfield's October 1, 1991 letter to the Board stating that it could not meet the compliance dates listed in Part I.C. of the draft 1992 Permit now that it had agreed to connect to the HRSD, the Board did not change the terms of the 1992 Permit. Part I.C. of the 1992 Permit retained the monthly average phosphorus limitation of 21 lbs/day and 2 mg/l, which was required after "completion of the schedule of compliance contained in Part I.B. (Total Phosphorus)." January 3, 1992 Permit, Part I.C., at 7. Part I.B. of the 1992 Permit required Smithfield to: (1) "[s]ubmit

quarterly progress reports for achievement of final effluent limitations" for phosphorus "[w]ithin 30 days of the effective date of the permit and each calendar quarter thereafter until completion of item # 2 below" and (2) "[a]chieve compliance with final effluent limitations" for phosphorous "[b]y January 4, 1993." *Id.* Part I.B., at 5.[8] A three-year schedule of compliance was also included for carbonaceous biological oxygen demand ("CBOD"), total cyanide, and ammonia-nitrogen,[9] which required Smithfield to "[a]chieve compliance with the final effluent limitations" for those effluents no later than May 13, 1994. *Id.* Part I.D., at 8.

In response to a February 12, 1992 letter from Smithfield to the Board, which indicated that Smithfield intended to achieve compliance with the final effluent limitations for CBOD, total cyanide, and ammonia-nitrogen by connecting to the HRSD system, the Board responded as follows:

> These "plans" are acceptable as submitted. The remainder of the schedule requires submittal of quarterly progress reports. These reports should indicate construction

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[8] Because Smithfield agreed to connect to the HRSD system, defendants contend that this schedule of compliance for the phosphorus limitations "merely provided the official point of reference that would be needed in case Smithfield reneged on its commitment to make the HRSD connection." Defs.' Br. at xii, ¶ 9nn. There is nothing in the record to support this conclusion.

[9] The terms "ammonia" and "ammonia-nitrogen" have both been used in the parties' briefs, filings, and exhibits, often interchangeably. Thus, it is unclear to the court whether the United States is alleging violations of the same or different effluent limitations when it alleges a violation of "ammonia-nitrogen" in Counts I and II, and a violation of "ammonia" in Counts III and IV. The Summary of Violations attached to Nash's Declaration, and the United States' brief in support of their motion for summary judgment only mention violations of "ammonia-nitrogen." Pl's Br. at iii, ¶ 9. Accordingly, the court will assume that "ammonia" and "ammonia-nitrogen" are the same effluent when quoting the record, and the court will refer to the effluent at issue as "ammonia-nitrogen."

> progress and other issues which may affect completion of the project. Also note that the deadline for achieving final effluent limitations is May 13, 1994. Should construction be delayed such that this deadline may be missed, a modification to the existing Consent Order should be requested.

May 15, 1992 Letter from Board to Smithfield (Defs.' Ex. 30).[10]

Defendants failed to meet either the January 4, 1993 deadline in the 1992 Permit for phosphorus compliance, or the May 13, 1994 deadline in the 1992 Permit for CBOD, total cyanide, and ammonia-nitrogen compliance. There is no evidence in the record that Smithfield sought or procured a permit modification with regard to these deadlines.

On November 8, 1994, the Board issued an amendment to the May, 1991 Special Order. In the November, 1994 Special Order, the Board agreed that Smithfield "may achieve compliance with the [final effluent limitations for CBOD, total cyanide, and ammonia-nitrogen] by connecting to the HRSD system" and agreed "to hold in abeyance the requirement in Part I.D.6. of the Permit for Smithfield to comply with these effluent limitations by May 13, 1994." November 8, 1994 Special Order at 1. In addition, the Board and Smithfield agreed "that an appropriate toxicity reduction evaluation plan, as required by Part I.F.4.c. of the Permit, is connection to the HRSD system in accordance with this Order. No additional toxicity testing is required." Id. at 1-2. At the end of the Special Order, the Board and Smithfield agreed that they both

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[10] In their brief, defendants state that "Smithfield was specifically exempted from the May 13, 1994 deadline for ammonia and cyanide in the letter from the Board dated May 15, 1992. (Exh. 30 at 1)." Defs.' Br. at xvi, ¶ 23. Clearly, the text of this letter from the Board shows that Smithfield was reminded of the deadline rather than "specifically exempted" from it.

"understand and agree that this amendment does not alter, modify, or amend any other term or condition of the Order or of the Permit except as specified above." *Id.* at 2.

No other Special Orders are relevant to the issues before this court at this time.

C. The HRSD system connection

Before defendants could connect to the HRSD system, Smithfield explains that three tasks had to be completed: (1) an upgrade of Smithfield's wastewater treatment system to pretreat properly the effluent before discharging it into the HRSD system; (2) construction of a seventeen-mile interceptor force main pipeline extending from the HRSD treatment facility to Smithfield, Virginia; and (3) an upgrade of HRSD's Nansemond treatment facility so that it could properly treat the additional effluent from defendants. Defs.' Br. at ix, ¶ 9dd.

Smithfield hired Wells Engineering to design and construct onsite wastewater treatment works sufficient to pretreat adequately its process effluent. Id. at ix, ¶ 9ee.[11] On August 23, 1991, HRSD submitted a Virginia Revolving Loan Fund Construction Assistance Program ("CAP")[12] application to the

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[11] It is unclear when Wells Engineering completed this construction, but it appears it may have been completed in 1996, as defendants state that "Wells Engineering designed and constructed these required facilities at a capital cost of approximately $3 million in 1995 and 1996." Defs.' Br. at ix, ¶ 9ee.

[12] In the Clean Water Act, Congress directed the EPA to establish capitalization grants, known as "state revolving funds," to each state to assist in the construction of publicly-owned treatment works. Section 601, 33 U.S.C. § 1381. Before funds will be given to a state, the EPA must enter into an agreement with that state establishing a procedure for the distribution of funds. Section 602, 33 U.S.C. § 1382. Once that agreement has been established, as it has in Virginia, the state oversees the individual projects. Section 603, 33 U.S.C. § 1383.

Board requesting funding of approximately $14.6 million for the construction of the seventeen-mile interceptor force main pipeline. The initial completion date for the pipeline was February, 1995. *Id.* at xii, ¶ 9pp. On July 29, 1992, HRSD submitted another CAP application to the Board requesting funding of approximately $54.4 million for upgrading the HRSD Nansemond facility to a treatment capacity of twenty-million-gallons per day. Although the original completion deadline for the Nansemond facility upgrade was December, 1996, *id.* at x, ¶ 9hh, this completion deadline was extended several times by the HRSD, to March 25, 1997. *Id.* at x, ¶ 9ii.[13]

The interceptor force main pipeline was completed on March 22, 1996, thirteen months after the original deadline for completion. *Id.* at xiii, ¶ 9qq. Outfall 002 at the Gwaltney plant was connected to the HRSD system on June 24, 1996, and there is currently zero discharge from this facility into the Pagan River. *Id.* at x, ¶ 9gg. Defendants expect to connect Outfall 001 at the Smithfield Packing plant to the HRSD system in May, 1997, as soon as the Nansemond facility is available, and completely cease their discharge from Outfall 001. *Id.* at x, ¶ 9ii.

D. Enforcement by the EPA

Under the NPDES enforcement program administered by the EPA, point source facilities that are not complying with their NPDES permit are listed in the EPA's Quarterly Noncompliance Report ("QNCR"). Decl. of Lorraine H. Reynolds ¶ 8. According to Ms. Reynolds, an Environmental Scientist with the EPA, defendants' violations of Permit No. VA0059005 did not appear on the QNCR until the third quarter of the 1994 fiscal year, because Smithfield falsely and inaccurately reported its discharges, and because the Commonwealth of Virginia issued consent orders allowing defendants

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[13] It is not clear from the record whether this project completion date for the Nansemond upgrade was met.

to exceed the limits established in the Permit. *Id.* ¶ 12. Ms. Reynolds notes that the "EPA was not a participant nor a signatory to the Commonwealth issued consent orders and therefore, EPA never agreed nor intended to be bound by the consent orders." *Id.* ¶ 13.

Once a company appears on the QNCR, the EPA begins to track the state's actions in getting the company into compliance. If the state does not achieve compliance, the EPA steps in and initiates its own enforcement action to ensure compliance. *Id.* ¶ 9. Once defendants' violations of Permit No. VA0059005 appeared on the QNCR in 1994, the EPA tracked the Commonwealth's attempts to get Smithfield into compliance. *Id.* ¶ 14.

On April 8, 1996, the Commonwealth's Department of Environmental Quality ("DEQ") notified Smithfield that it had evidence of numerous violations of the Permit and Special Orders, including violations of effluent limits, sampling and analysis methods, recording of results, records retention, reporting requirements, operator requirements, treatment works operation, quality control requirements, and unauthorized discharge of pollutants. April 8, 1996 Letter from DEQ to Smithfield at 1 (Pl.'s Ex. 18). Due to these violations, the DEQ stated it would recommend to the Board that it consider asking the Attorney General of Virginia to seek injunctive relief and civil penalties against Smithfield. *Id.* at 2. At their May 22, 1996 meeting, however, the Board instead voted to "reaffirm their March 21, 1996, approval of the Consent Special Order for the HRSD Nansemond Treatment Plant" and "direct [its] staff not to take enforcement action against Smithfield, Inc. for violations of their 1991 Consent Special Order until such time as staff has met with the company and brought the matter back to the Board at their next meeting." Excerpt of Minute No. 28 from the Board Meeting on May 22, 1996 (Pl.'s Ex. 19).

"When it became apparent that the Commonwealth's actions were not resulting in compliance, and the Common-

wealth did not intend to seek a civil penalty for the violations, the EPA initiated its own enforcement action." Decl. of Reynolds ¶ 14. On August 27, 1996, the EPA informed the Commonwealth that it had referred a case against defendants to the United States Department of Justice for an enforcement action, and invited the Commonwealth to join the federal action. The EPA provided the Commonwealth with a copy of the table of defendants' violations. *Id.* ¶ 15.

The Commonwealth declined the EPA's invitation to join the federal action. Although the Commonwealth never mentioned its plan to file its own enforcement action to the EPA, *id.*, on August 30, 1996, the Commonwealth filed an action against Smithfield in the Circuit Court of the County of Isle of Wight. The Commonwealth sought injunctive relief and civil penalties for Smithfield's violations of the Permit and Special Orders, and alleged violations of "the Permit limitations for fecal coliform, pH, total suspended solids, biochemical oxygen demand, and oil and grease" dating back to 1994. Commonwealth's Complaint at 3 (filed Aug. 30, 1996) (Pl.'s Ex. 23). The Commonwealth did not seek penalties for phosphorus violations, inaccurate reporting, or late reporting. See *id.* at 1-4. The Commonwealth amended its complaint on September 20, 1996, to correct certain factual allegations and to add an allegation that Smithfield violated "other permit terms and conditions" of Permit No. VA0059005. Commonwealth's Amended Complaint at 3 (filed Sept. 20, 1996) (Pl.'s Ex. 24).

The United States filed this action on December 16, 1996, seeking permanent injunctive relief and civil penalties from all three defendants for violations of Clean Water Act § 309(b) and (d), 33 U.S.C. § 1319(b) and (d). Count I alleges that since October, 1991, defendant Smithfield discharged pollutants from Outfall 001 into the Pagan River in violation of the effluent limits in the Permit for phosphorus, ammonia-nitrogen, TKN, fecal coliform, pH, cyanide, and oil and grease. Count II alleges that from October, 1991, until June,

1996, defendant Smithfield discharged pollutants from Outfall 002 into the Pagan River in violation of the effluent limits in the Permit for phosphorus, ammonia-nitrogen, TKN, fecal coliform, and oil and grease. In Counts III and IV, plaintiff alleges that since October, 1991 for Count III, and between October, 1991 and June, 1996 for Count IV, defendants Smithfield Packing and Gwaltney discharged pollutants from Outfalls 001 and 002 into the Pagan River in violation of the effluent limits in the Permit for phosphorus, ammonia, TKN, fecal coliform, pH, cyanide, oil and grease, CBOD, and biological oxygen demand ("BOD"). In the alternative, Counts III and IV allege that on numerous occasions during these time periods, Smithfield Packing and Gwaltney discharged pollutants from Outfalls 001 and 002 into the Pagan River without a permit. Count V alleges failure of all defendants to comply in a timely manner with the Permit's reporting requirements since October, 1991. Count VI alleges that all defendants submitted DMRs containing inaccurate information. Count VII alleges failure of defendants to maintain records, or destruction of records required to be maintained by the Permit.

Defendants' Answer, filed January 9, 1997, put forth several affirmative defenses. Defendants maintain Permit No. VA0059005 was

> actually or constructively conditioned or amended, or an actual or constructive variance granted, or the underlying standards were revised by the issuance of several Special Orders and amendments thereto by the Virginia State Water Control Board. None of the Defendants violated the permit as revised with respect to the following pollution parameters: phosphorus, nitrogen, CBOD, cyanide and ammonia.

Answer at 13. Defendants also argue that they agreed to connect to the HRSD system to achieve compliance with the Permit, but were unable to connect earlier due to circumstances and delays beyond their control. Therefore, even if

they did fail to meet the terms of the Permit, defendants claim they "cannot be held liable therefore when it was impossible to meet the terms of the permit until the [HRSD] sewer line had been completed." *Id.* at 14-15.[14] In addition, defendants assert that plaintiffs claim for civil penalties is barred by the doctrines of estoppel, waiver, and/or laches, and by Section 309(g)(6)(A) of the Clean Water Act. *Id.* at 12-13.[15]

In the United States' Motion for Partial Summary Judgment on Liability and Section 309(g)(6) Issues, filed March 10, 1997, the United States argues that there is no genuine issue of material fact that defendants committed thousands of days of violations of the Clean Water Act by discharging pollutants into the Pagan River at levels above the limits contained in the Permit[16] and that Smithfield committed over one

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[14] Although defendants maintain that it is not their fault that the HRSD connection was delayed, fault is not the focus of this inquiry, as the Clean Water Act is a strict liability statute, intended to protect the public from environmental damage. Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1208 (4th Cir.1986). It is the defendants, and not the public, who are discharging wastewater into the Pagan River, who waited until June 7, 1991, to commit to connect to the HRSD system, and who have still not fully connected to the HRSD system. Accordingly, it is defendants, and not the public, who should pay the price for the damage to the environment caused by their Permit violations and the delay in the HRSD connection. *See also infra* note 19.

[15] In their response, defendants indicate that they believe that plaintiff's claim for injunctive relief is also barred by Section 309(g).

[16] The United States alleges violations of phosphorus, ammonia-nitrogen (or ammonia), TKN, fecal coliform, pH, cyanide, oil and grease, CBOD, and BOD in the Complaint. In their brief and the Summary of Violations, however, the United States alleges violations of phosphorus, ammonia-nitrogen, TKN, fecal coliform, pH, cyanide, oil and grease, and total suspended solids-not CBOD and BOD. See Pl.'s Br. at iii, ¶ 9; Decl. of Nash at App. C. Because the limits for CBOD and BOD are listed separately from the limits for total suspended solids in the Permit, the court will address separately the violations of the effluent limitations for CBOD, BOD, and total suspended solids.

hundred days of violations by submitting required reports late. In addition, the United States contends it is entitled to summary judgment because the Permit did not incorporate the Special Orders issued by the Commonwealth, the United States is not estopped from enforcing the Permit, and the United States' claims are not barred by Clean Water Act § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A).

In defendants' response, filed March 26, 1997, they address the issues in the United States' Motion, and also argue that the United States is not entitled to summary judgment with regard to the phosphorus claims because Section 510 of the Act, 33 U.S.C. § 1370, bars federal enforcement of limitations that are set by the state and that are more stringent than federal limits. The United States filed a rebuttal on April 1, 1997. The court heard argument from the parties on April 14, 1997. and the matter is ripe for decision.

II. Analysis

Summary judgment is appropriate only when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, finds there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see, e.g., *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Terry's Floor Fashions, Inc. v. Burlington Indus.*, 763 F.2d 604, 610 (4th Cir.1985). Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial. *Celotex Corp.*, 477 U.S. at 322-24, 106 S.Ct. at 2552-53. Such facts must be presented in the form of exhibits and sworn affidavits. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. at 2552.

The court concludes that the United States is entitled to partial summary judgment as a matter of law for several reasons. First, there is no genuine issue of material fact that defendants are liable for violations of Clean Water Act § 309(b) and (d), 33 U.S.C. § 1319(b) and (d). Specifically, Smithfield Foods is liable for at least 164 days of violations of the reporting requirements of Permit No. VA0059005 (Count V); and defendants Smithfield Foods, Smithfield Packing, and Gwaltney are liable for any violations of the effluent limitations contained in Permit No. VA0059005 for: phosphorus, ammonia-nitrogen, TKN, fecal coliform, minimum pH, cyanide, oil and grease, CBOD, BOD, and total suspended solids (Counts I-IV). Second, Permit No. VA0059005 did not incorporate, nor was it conditioned, revised, or superseded by, the Board's Special Orders issued prior to the filing of this action. Third, the United States' claims are not barred by estoppel. Fourth, the United States' claims are not barred by Clean Water Act § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A). Fifth, the United States' phosphorus claims are not precluded by Clean Water Act § 510, 33 U.S.C. § 1370. Each of these conclusions is addressed in turn below.

A. Clean Water Act violations

The United States alleges that defendants violated Permit No. VA0059005 when Smithfield Foods submitted late reports, and when all the defendants discharged wastewater into the Pagan River that violated the effluent limitations contained in the Permit. Section 309(a)(3) of the Act provides that the EPA can bring a civil action in accordance with Section 309(b), 33 U.S.C. § 1319(b), for appropriate relief against "any person . . . in violation of any permit condition or limitation in a permit" issued pursuant to the Clean Water Act. 33 U.S.C. § 1319(a)(3).

Under Section 502(5), 33 U.S.C. § 1362(5), a corporation is considered a "person" within the meaning of the Act. It is undisputed that Smithfield Foods and Gwaltney are Delaware corporations, and Smithfield Packing is a Virginia corporation, thereby constituting "persons" under the Act. In their Answer, however, defendants contend that Smithfield Packing and Gwaltney did not have any obligations or duties under Smithfield Foods' Permit, and thus cannot be held liable for violations of the Permit, because they are not named in the Permit. The court disagrees. First, Section 309(a)(3), 33 U.S.C. § 1319(a)(3), clearly states that "persons"—not permit holders— are liable for permit violations. Second, defendants admit that "Smithfield Foods operates two wastewater treatment plants which accept and treat the wastewaters generated by the Smithfield Packing and Gwaltney facilities." Answer ¶ 18. By generating wastewater discharged into Smithfield Foods' wastewater treatment plants, which was then discharged into the Pagan River, Smithfield Packing and Gwaltney actively caused violations of Smithfield Foods' Permit and are, therefore, considered "persons" who may be held liable for violations of the Act.[17] Cf. *United States v. Avatar Holdings, Inc.*, No. 93-281-CIV-FTM-21, 1995 WL 871260, at *14 (M.D.Fla. Nov. 22, 1995) (unpublished) (parent liable for subsidiaries' violations if parent "acted in such a way that it may be considered a 'person who violates' under § 309(d) of the Clean Water Act, through such actions as directing or causing the violations").

1. Smithfield Foods' late submittal of reports

The United States claims that Smithfield Foods did not timely submit the Discharge Monitoring Reports detailing the results of sampling and analysis of the wastewater discharged from Outfalls 001 and 002. Smithfield Foods' Permit No. VA0059005 requires submission of DMRs reporting the re-

[17] Defendants did not dispute this argument in their response to the United States' Motion.

sults of sampling on individual parameters within ten days of the end of each month. According to Leonard Nash, an Environmental Protection Engineer with the EPA, Smithfield Foods submitted the September, 1994 DMR, which was due on October 10, 1994, without reporting a value for average loading of TKN. The Notice of Violation issued by the Commonwealth of Virginia indicates that this missing information was not submitted until 58 days after it was due, on December 9, 1994. Decl. of Nash ¶ 17-18.

Smithfield Foods does not contest that the DMR did not contain the value for the average loading of TKN. Instead, it contends that the EPA could have easily calculated this value using information in the DMR on both flows and concentrations. The court agrees with the United States that the Clean Water Act requires the permittee to submit the values in the DMR, not just the raw data, because "[i]f Smithfield Foods' argument prevailed, every person required to submit discharge monitoring reports could simply provide EPA with copies of their data and demand that the regulators determine the values." Pl.'s Rebuttal at 3. In addition, Smithfield Foods explains that the employee responsible for submitting the DMRs was on sick leave from late August, 1994, until October, 1994, and that the data was submitted within a reasonable time after the error was discovered. Defs.' Br. at xiii, ¶ 12. These excuses, however, are irrelevant with regard to Smithfield Foods' liability for violations of the Permit, because the Clean Water Act is a strict liability statute. *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir.1986).

The Permit also required the submission of annual reports regarding Smithfield Foods' toxics management plan by May 10, 1993. Decl. of Nash ¶ 19. According to the Notices of Violation, Smithfield Foods' annual toxics management plan was not received until August 26, 1993, which was 106 days late. Smithfield Foods does not contest this fact. Defs.' Br. at xiii, ¶ 12.

Because these two incidents of late reporting by Smithfield Foods are uncontested violations of Permit No. VA0059005, the court GRANTS summary judgment against Smithfield Foods on the issue of liability for at least 164 days of violations of the reporting requirements of the Permit. If the United States uncovers additional instances of late reporting during discovery, or any other violations of the Permit, the court will allow it to prove these additional violations by defendants.

2. *Defendants' violations of effluent limits*

Permit No. VA0059005 requires the submission of monthly reports detailing the results of sampling conducted on wastewater discharged from defendants' plants. Decl. of Nash ¶ 12. A copy of the DMRs submitted by defendants is attached as Appendix B to Mr. Nash's Declaration. *Id.* at App. B. "Required reports such as DMRs may be used as admissions in court to establish a defendant's liability." *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 n. 8 (4th Cir.1988), *cert. denied*, 491 U.S. 904, 109 S.Ct. 3185, 105 L.Ed.2d 694 (1989). Consequently, several courts have accepted the data reported by a defendant in its DMRs as true, and entered summary judgment on the issue of liability based on the DMRs completed by that defendant. *See, e.g., Connecticut Fund for the Environment v. Job Plating Co., Inc.*, 623 F.Supp. 207, 218 (D.Conn.1985) (granting summary judgment based on DMRs, and noting that several courts who granted summary judgment in citizen suits brought under 33 U.S.C. § 1365 based their decision "on findings of strict liability derived from discharge data reported in defendants' DMRs that exceeded levels allowed by NPDES permits"); *Student Public Interest Research Group of New Jersey v. Georgia-Pacific Corp.*, 615 F.Supp. 1419, 1429-33 (D.N.J. 1985) (accepting as true the data reported in a defendant's DMR, and rejecting defendant's argument that when it exceeded its permit, this was not a violation of the Act). Since

the Act's approach of regulating effluent levels "was intended to achieve 'swift and direct' enforcement based on 'simple numerical standards,'" *Georgia-Pacific*, 615 F.Supp. at 1430 (citing *Corn Refiners Ass'n, Inc. v. Costle*, 594 F.2d 1223, 1226 (8th Cir. 1979)), this court is reluctant to limit the legal effect of any permit violations revealed in the DMRs completed by defendants.

Defendants' DMRs have been reviewed by Mr. Nash in accordance with his position at the EPA. Based on the DMRs, Mr. Nash has determined that defendants have committed numerous violations of the Permit, which are summarized in Appendix C to Mr. Nash's Declaration. Decl. of Nash ¶ 14 & App. C.[18] Although defendants contend that they did not violate "the permit as revised with respect to the following pollution parameters: phosphorus, nitrogen, CBOD, cyanide, and ammonia," Answer at 13, defendants submitted DMRs which indicate that they did violate the effluent limitations contained in the Permit, and they admit that "Smithfield Foods has on occasion discharged effluent from Outfalls 001 and 002 in excess of the limits in VPDES Permit No. VA0059005, as issued, amended, revised and reissued from time to time, which permit speaks for itself." *Id.* at 5, ¶ 25. Because defendants grudgingly admit that they violated the terms of the Permit, if the Permit is considered in isolation from the Board's Special Orders and letters, and because defendants'

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[18] In determining the number of days of violations, Mr. Nash counted each daily maximum violation as a separate violation. For each monthly average violation, Mr. Nash calculated the number of violations by using the number of days in that month. Decl. of Nash ¶ 16 & App. B. According to these calculations, defendants committed 5,330 total days of violations of the effluent limits contained in Permit No. VA0059005: 4,501 for phosphorous, 458 for ammonia-nitrogen, 199 for TKN, 70 for fecal coliform, 4 for minimum pH standard, 4 for cyanide, 1 for oil and grease, and 93 for total suspended solids. Pl.'s Br. at iii, ¶ 9. Although offering no concrete evidence to the contrary, defendants disagreed with the United States' determination of the number of days of violations, and reserved the right to address this issue at a later time. Defs.' Br. at 10 n. 3.

DMRs are admissions for the purpose of establishing liability and they indicate that defendants have repeatedly violated the effluent limits contained in the Permit, the court GRANTS the United States summary judgment on the issue of liability for defendants' violations of the effluent limitations contained in Permit No. VA0059005 for: phosphorus, ammonia-nitrogen, TKN, fecal coliform, minimum pH, cyanide, oil and grease, CBOD, BOD, and total suspended solids.[19] The amount of the days of violation for each effluent will be determined by the court at a later juncture.[20]

B. The 1992 Permit did not incorporate, nor was it "conditioned revised or superseded by," the Board's Special Orders with regard to phosphorus, TKW, CBOD, cyanide, and ammonia-nitrogen

Defendants claim they did not violate the effluent limitations stated in the 1992 Permit because the Permit incorpo-

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[19] In their brief and at the April 14, 1997 hearing, defendants argued that they should not have to pay penalties to the federal government for alleged violations of the 1992 Permit because they have paid, and continue to pay, a substantial amount of money for the HRSD connection, and because there will be zero discharge by defendants into the Pagan River once they connect Outfall 001 to the HRSD system, as Outfall 002 has already been connected. While defendants' efforts to eliminate their discharge into the Pagan River are certainly laudable, they are still required to meet their obligations under the Permit. This is true even if the court believes that defendants did not cause the delay in finishing the HRSD—Smithfield connection—they should have sought a Permit modification, and approval of the EPA, once it was clear they could not meet the deadlines in the Permit. As determined herein, the EPA-approved Permits control over any Special Orders issued by the Board. *See infra* Part II.B.2. The selection of the means of compliance with the Permit was at the discretion of defendants, and clearly they knew they would be required to pay a considerable amount of money to achieve compliance, regardless of the means selected. That defendants will eventually achieve compliance with the Act, and spend a considerable amount of money to do so, does not excuse the fact that for years they have discharged pollutants into the Pagan River in violation of Permit No. VA0059005.

[20] *See supra* note 18.

rated, or was "conditioned, revised, or superseded by" the Special Orders of the Board, Defs.' Br. at ii, ¶ 7, "with respect to the following pollutant parameters: phosphorus, nitrogen, CBOD, cyanide, and ammonia." Answer at 13. According to defendants, if you consider the Permit and the Special Orders together, Smithfield did not violate the effluent limits because the Board agreed to delay the commencement of the Permit's schedule of compliance in the Special Orders, including the May, 1991 Special Order.

With regard to the phosphorus limitations, defendants maintain that the May, 1991 Special Order gave them two options. Under the first option, Smithfield would agree to connect to the HRSD system within three months after a connection was made available by HRSD. In return, Smithfield alleges, the Board agreed to exempt Smithfield from the deadline for compliance with the phosphorus limitations in the Permit. The second option required Smithfield to expand or upgrade its wastewater treatment facilities to achieve compliance with the phosphorus limitations in accordance with the schedule of compliance in the Permit. Defs.' Br. at viii, ¶11 9y-z.

In other words, if Smithfield agreed to connect to the HRSD system, defendants contend that the May, 1991 Special Order "did not impose interim phosphorous limits or require commencement of a Schedule of Compliance." *Id.* at viii, ¶ 9y. Moreover,

> Smithfield's only obligation with respect to phosphorus was to connect to the HRSD system within three months of system availability. Until the connection was available, Smithfield could not be expected to comply with the 1990 Modified Permit phosphorus limits. Compliance would only have been possible in the interim through the significant expansion of its wastewater treatment system—an expansion made moot by an agreement by Smithfield to connect to HRSD.

Id. Defendants claim they could not afford to connect to the HRSD and construct or upgrade their treatment facilities to meet the Permit's schedule of compliance. Thus, under the terms of the May, 1991 Special Order, defendants maintain that they were only required to commit to connect to the HRSD system or comply within the modified 1990 Permit deadlines by expanding or upgrading their treatment facilities.

According to defendants, the EPA reviewed and approved of the agreement between the Board and Smithfield that the latter would be exempt from compliance with the phosphorus effluent limits in the Permit, if Smithfield agreed to connect to the HRSD system.[21] First, the EPA approved the 1992 Permit after receiving a copy of the Board's May, 1991 Special Order, and a copy of the Board's October 10, 1991 letter stating that "[any special order agreements relative to compliance with water quality standards take precedence over the VPDES Permit." Oct. 10, 1991 Letter from Board to Smithfield at 2, ¶ 3. Because the EPA did not notify the Board or Smithfield that it disagreed with the May, 1991 Special Order or the October, 1991 letter, defendants contend the EPA approved of it. Defs.' Br. at 13-14. Second, after the EPA received information from Smithfield indicating that defendants were following the requirements in the Special Orders, rather than those in the Permit, it also failed to indicate that defendants were doing anything wrong. Defs.' Br. at 14 & n. 9 (noting that the EPA has possession of Smithfield's DMRs in its files). Third, defendants point out that once Smithfield elected to connect to the HRSD system, the EPA indicated that it reviewed and approved of the plan when it noted that "[t]he sewer line offers a cost effective solution for this major regional industry," Mar. 14, 1994 EPA Program Evaluation Report at 16 (Defs.' Ex. 4), and provided federal funding, via

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[21] These arguments are also relevant to defendants' defense of estoppel, which will be addressed at *infra* Part II.C.

the Virginia Revolving Loan Fund Program, which was used for the HRSD upgrade and sewer connection. Defs.' Br. at ii, ¶ 3b.

In light of these facts, defendants claim they relied upon their agreement with the Board and their belief that the terms of the May, 1991 Special Order, and the agreements in the other Special Orders and letters, took precedence over the terms of the 1992 Permit. Citing *United States v. AM General Corp.*, 34 F.3d 472 (7th Cir.1994), and *United States v. Solar Turbines, Inc.*, 732 F.Supp. 535 (M.D.Pa.1989), defendants contend that a permit holder should be entitled to rely on the statements of a state agency without fear of being subjected to a federal penalty action that is actually a challenge to the permit's terms, especially when "a permit holder can see on the face of the documents memorializing the state agency's official decision that the federal government has no objection." Defs.' Br. at 12.

In *AM General*, when the EPA objected to the terms of a state-issued permit issued to a manufacturer, it forwent pursuing a direct challenge to the permit, and instead flied a civil penalty action against the manufacturer alleging violations of emissions standards promulgated under the Act. The Seventh Circuit held that the Act did not "authorize the EPA to mount a collateral attack on a permit by bringing a civil penalty action as many as five years after the permit had been granted and the modification implemented, 28 U.S.C. § 2462, by which time a defendant would have accrued a potential liability in excess of $40 million even though it had been operating under a permit valid on its face and never before challenged." *AM General*, 34 F.3d at 475.

In *Solar*, a district court rejected the EPA's attempt to pursue an enforcement action against a permittee who was acting in accordance with its state permit. Although the EPA believed the state permit had been improperly granted, the court found the permittee had not committed a violation of the permit. Allowing the government to proceed with the action

"would not only be contrary to the general enforcement scheme in the Clean Air Act, but would also lay waste to a source's ability to rely on a permit it has been issued by an authorized state permitting agency." *Solar*, 732 F.Supp. at 540.

AM General and *Solar* do not support defendants' argument, and they are distinguishable from this case. In those cases, the defendants complied with their permits, and the federal government objected to the terms of the permit, decided to forgo a direct challenge, and instead filed an enforcement action which in effect challenged the terms of the permit. In the case at hand, defendants have not complied with the terms of the Permit, so they cannot argue that they relied on its terms to their detriment. Moreover, unlike AM General and Solar, here the United States is enforcing—not challenging—the terms of defendants' state-issued Permit. It is the defendants who chose to forgo a direct challenge to the terms of the Permit, and who are currently challenging it by arguing that the Board's Special Orders are incorporated into, or change, the terms of the Permit.

There are two other problems with defendants' argument that they are not liable for effluent violations under the Permit because it incorporated the Board's Special Orders, which exempted them from compliance, if they elected to connect to the HRSD system. First, it is not clear that the May, 1991 Special Order exempted defendants from compliance with the phosphorus limitations in the Permit, if they elected to connect to the HRSD system. Second, even if the Special Orders provided for this exemption, in addition to the exemptions for CBOD, cyanide, and ammonia-nitrogen, and the interim limits for TKN, the Special Orders were not incorporated into, nor did they "condition, revise, or supersede," the 1992 Permit.

1. Exemption from compliance

For the effluent TKN, the Board's May, 1991 Special Order, and other Special Orders, clearly provided interim efflu-

ent limitations and monitoring requirements for Smithfield that were different from the Permit requirements. It is not clear, however, that the May, 1991 Special Order exempted Smithfield from the January 4, 1993 deadline for full compliance with the phosphorus limitations, if Smithfield elected to connect to the HRSD system, as defendants claim[22] Appendix A to the May, 1991 Special Order set forth interim discharge limitations and monitoring requirements for TKN, and provided that "[e]ffluent limitations and monitoring requirements for *all other* parameters and characteristics shall be those set out in the *Permit*." (emphasis added). The May, 1991 Special Order states that Smithfield was required to comply with the interim effluent limitations in Appendix A of the Special Order, until it connected to the HRSD system or completed the approved upgrade of its treatment facilities. May 9, 1991 Special Order at 2, ¶ 4. Thus, it appears that Smithfield was required to comply with the limitations in the Permit for all effluents, except TKN. The court is unable to find in the May, 1991 Special Order any specific or express statement by the Board that Smithfield was not required to achieve full compliance with the phosphorus limitations by January 4, 1993, if it elected to connect to the HRSD system.

Moreover, on October 1, 1991, Smithfield indicated in a letter to the Board that it did not believe the May, 1991 Special Order specifically relieved it from compliance with the limitations in the Permit: "[r]elief from such compliance [with the effluent limitations in Part I.C. of the draft 1991

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[22] In the May 1991 Special Order, the Board required Smithfield to notify the Board no later than June 15, 1991, of defendants' commitment "to connect to the HRSD line or to upgrade their facilities to comply with the 2 milligram per liter phosphorus standard." May 9, 1991 Special Or "upgrade their facilities to comply with the 2 milligram per liter phosphorus standard." Defs.' Br. at viii-ix, ¶¶ 9x-9cc. Another way to read this sentence, however, is that defendants were required to "comply with the 2 milligram per liter phosphorus standard," either by (1) connecting to the HRSD line or (2) upgrading their facilities.

Permit, which included a phosphorus limitation required to be achieved by January 4, 1993,] *is not specifically present or is not apparent in the [1991] Consent Order.*" Oct. 1, 1991 Letter from Smithfield to Board at 3 (emphasis added). Although defendants sought reassurance from the Board, in the form of "some documentation or letter," that they were relieved from compliance with the effluent limitations in the Permit if they agreed "to connect to HRSD as soon as it becomes available regardless of the time frame in which it occurs," *id.*, the Board did not do so in its response. Instead, the Board indicated that the Permit deadlines were still applicable to defendants when it stated, *inter alia*, that "[t]he compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations." Oct. 10, 1991 Letter from Board to Smithfield at 2, ¶ 3. Thus, neither the Board's May, 1991 Special Order, nor its October 10, 1991 letter, clearly exempted defendants from the January 4, 1993 deadline for full compliance with the phosphorus limitations, if defendants elected to connect to the HRSD system.

In addition, defendants' current interpretation of the Board's May, 1991 Special Order and October 10, 1991 letter does not make sense when one considers the fact that *after* Smithfield agreed to the HRSD connection on June 7, 1991, the 1992 Permit issued by the Board *included* the January 4, 1993 deadline for phosphorus compliance, and a May 13, 1994 deadline for CBOD, cyanide, and ammonia-nitrogen compliance. It would be illogical for the Board to include deadlines in a 1992 Permit which are no longer applicable to Smithfield after June 7, 1991, as defendants contend. Defendants boldly assert that the deadlines "merely provided the official point of reference that would be needed in case Smithfield reneged on its commitment to make the HRSD connection." *Id.* at xii, ¶ 9nn. Nothing in the 1992 Permit, or the entire record, supports this contention. On the contrary, the Board's inclusion of these deadlines in the 1992 Permit,

and the absence of any clear statement in the May, 1991 Special Order that defendants were exempt from the schedule of compliance for phosphorus, if they decided to connect to the HRSD system, points to the fact that neither the May, 1991 Special Order, nor any other Special Order or letter, relieved defendants from compliance with the January 4, 1993 deadline in the Permit for the phosphorus limitations.[23]

The Board did provide an exemption, however, for the CBOD, cyanide, and ammonia-nitrogen limitations in the November 8, 1994 amendment to the May, 1991 Special Order. After the 1992 Permit was issued, and after the May 13, 1994 deadline for compliance with the CBOD, cyanide, and ammonia-nitrogen limits had passed without full compliance by defendants, the Board issued an amendment to the May, 1991 Special Order on November 8, 1994, in which it agreed that defendants "may achieve compliance with [the permit effluent limitations for CBOD, total cyanide, and ammonia-nitrogen] by connecting to the HRSD system." Nov. 8, 1994 Special Order at 1. The Board further decided "to hold in abeyance the requirement in Part I.D.6. of the Permit for Smithfield to comply with these effluent limitations by May 13, 1994," and agreed that "this amendment does not alter, modify, or amend any other term or condition of the Order or of the Permit except as specified above." *Id.* at 1-2. Although these Special Orders may have included different requirements for TKN, CBOD, total cyanide, and ammonia-nitrogen, defendants are still liable for Permit violations for these effluents, unless the Special Orders actually changed the terms of the 1992 Permit.

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[23] While the Board did defer the commencement of the schedule of compliance for the phosphorus limitations in its March, 1990 and November, 1990 Special Orders, the entire schedule for phosphorus compliance, or the January 4, 1993 deadline, was not deferred in the March, 1990 and November, 1990 Special Orders. See supra note 4. phosphorus compliance, or the January 4, 1993 deadline, was not deferred in the March, 1990 and November, 1990 Special Orders. *See supra* note 4.

2. The Special Orders did not change the terms of the Permit

Defendants admit that the May 9, 1991 Special Order provides that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in VPDES Permit No. VA 0059005." May 9, 1991 Special Order at 2; see Defs.1 Br. at xv, ¶ 20 (admitting sentence four of ¶ 20 of Pl.'s Facts). Defendants claim, however, that they are not arguing that the Special Orders altered, modified, or amended the Permit—they claim the Special Orders were incorporated into, or "conditioned, revised, or superseded," the 1992 Permit. Defs.' Br. at ii, ¶ 7. Regardless of the semantics, for the purposes of this motion, the court must determine whether the terms of the 1992 Permit, or defendants' obligations under the 1992 Permit with regard to the EPA, were changed in any way by the Board's Special Orders or letters. There is no evidence to suggest that the Special Orders or letters were incorporated into, or that they conditioned, revised, superseded, altered, modified, amended, or changed the terms of the 1992 Permit, or defendants' obligations under the Permit.

With regard to the Board's Special Orders and letters dated *after* the issuance of the 1992 Permit, there is no evidence in the record that they changed the terms of the 1992 Permit or defendants' obligations under the Permit. First, there is no evidence that defendants ever followed the specific, mandatory procedures for modification of a Permit. *See* 40 C.F.R. § 122.62; *see also Citizens for a Better Environment—California v. Union Oil Co. of California*, 83 F.3d 1111, 1119 n. 7 (9th Cir.1996) (finding that a cease and desist order did not modify the terms of the permit because it was undisputed that the permit modification procedures were not followed), cert. denied, — U.S. —, 117 S.Ct. 789, 136 L.Ed.2d 731 (1997). Second, the Virginia statute cited by the Board for its authority in the Special Orders does not authorize permit

modification; rather, it authorizes the Board to, *inter alia*, "issue special orders to owners (i) who are permitting or causing the pollution . . . of state waters to cease and desist from such pollution. . . ." Va.Code § 62.1-44.15(8a). Accordingly, because defendants did not follow the procedures required for the modification of a permit, and none of the Board's Special Orders and letters were issued in accordance with the permit modification procedures, defendants cannot support their argument that the Special Orders or letters issued by the Board after the 1992 Permit modify the terms of the Permit or bind the EPA.[24]

The Board's Special Orders or letters dated *before* the issuance of the 1992 Permit cannot logically change the terms of a more recent Permit approved by the Board and the EPA. The 1992 Permit was issued after the May, 1991 Special Order and the October 10, 1991 letter. Consequently, these documents, and any other Special Orders or letters of the Board dated prior to January 3, 1992, cannot change the terms of the 1992 Permit.

Moreover, the court does not agree with defendants that the EPA "incorporated" the Boards' May, 1991 Special Order and October 10, 1991 letter into the 1992 Permit, and approved of the agreement between the Board and Smithfield, when it failed to object to the content of these documents before approving the 1992 Permit, and when it failed to object after receiving information from defendants indicating they were violating the terms of the Permit, but not the terms of the Special Orders. The EPA's silence with regard to the

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[24] If the court allowed the terms of a Permit to be modified by special orders or interpretive letters issued by the state, which are not subject to EPA approval, this would undermine the EPA's ability to enforce the Act. In the Act, Congress gave the EPA authority to approve of and enforce permits, and to set specific regulatory guidelines for the modification of permits. States and permittees should not be allowed to circumvent the Act by issuing consent orders or interpretive letters which are binding on the EPA without its consent or approval.

agreement between Smithfield and the Board does not indicate its approval, especially when the EPA was not asked to review and approve of Smithfield's agreement with the Board.[25]

Furthermore, even if the EPA indicated approval of the HRSD-Smithfield connection when it stated it was a "cost effective solution," and provided funding through the Virginia Revolving Loan Fund Program for the HRSD upgrade and sewer extension,[26] this does not mean that the EPA approved of the timetable for compliance allegedly established by the Board, *i.e.*, that upon deciding to connect to the HRSD, Smithfield no longer had to comply with the limitations in the Permit, but was only required to connect to the HRSD within three months of its availability, regardless of when the connection became available.

Even if defendants thought in good faith that the United States was bound by the agreements in the Special Orders and letters of the Board, the United States is not bound unless it is a party to those agreements or it consents to be bound. *See United States v. Atlas Powder Co.*, 26 Env't Rep. Cas. (BNA) 1391, 1392 (E.D.Pa.1987) (Pl.'s Ex. 31) (where explosives manufacturer had good faith belief that United States was bound by terms of a consent decree between environmental group and manufacturer, court held that United States was not subject to liability for manufacturer's attorneys' fees and costs in negotiating settlement with the group). The court in *Atlas Powder* noted that

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[25] This conclusion of the court is also addressed in the estoppel section. *See infra* Part II.C.

[26] It is not clear to what extent the EPA reviewed or approved of the HRSD—Smithfield connection. The United States contends that while the EPA may require a state to refund monies loaned in violation of the financial restrictions set forth in a state revolving fund agreement, the EPA cannot approve or disapprove of a particular project—it is the state that oversees the individual projects. Pl.'s Br. at 9 (citing 55 Fed.Reg. 10176 (Mar. 19, 1990) and 40 C.F.R. part 35).

> [t]here is no authority for the proposition that the United States has an affirmative duty to notify a potential defendant that it does not intend to be bound by any consent decree entered into by the defendant and a private party, or by the defendant and the Commonwealth. *The United States is not bound by the settlement agreements or judgments in cases to which it is not a party.*

Id. (emphasis added).

In the case at hand, the United States was not a party to the agreements between the Board and Smithfield, and it never affirmatively agreed to be bound by the Board's Special Orders and letters. Decl. of Reynolds ¶ 13. Thus, the Special Orders and letters of the Board have no binding effect on the United States. This fact is true even though the EPA received copies of the Special Orders and letters, and failed to indicate its disapproval. *See United States v. Ohio Edison Co.*, 725 F.Supp. 928 (N.D.Ohio 1989) (holding that the United States did not "waive any objection" to the state's suspension of a construction schedule when the EPA failed to object or oppose the action, because "[s]ending a copy of the letter to the [EPA] . . . is not equivalent to the procedural requirements set forth in 40 CFR 123.44 or Section 402(d) of the Act, which allow the Administrator of the [EPA] to veto a state's issuance of a permit").

Defendants next argue that the Board's contemporaneous interpretations of defendants' obligations under the Permit and Special Orders are entitled to greater deference than explanations made after-the-fact. Defs.' Br. at 10 n. 4; *see SSM Rehabilitation Institute v. Shalala*, 68 F.3d 266, 270 (8th Cir. 1995) (an "agency's contemporaneous interpretation of its own regulation is entitled to greater deference" than an explanation made by that same agency "after-the-fact") (citing *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965)). According to defendants, the Board's contemporaneous interpretation is that the May 9, 1991 Spe-

cial Order exempted them from phosphorus compliance, if they chose the HRSD connection, and this Special Order took precedence over the terms of the 1992 Permit. In 1991, Smithfield asked the Board whether the draft 1992 Permit was imposing the January 4, 1993, compliance date for phosphorous standards and therefore ignoring the 1991 Special Order. See Oct. 1, 1991 Letter from Smithfield to Board at 3. The Board responded that "[t]he draft permit is a separate document from the current Consent Special Order issued to Smithfield Foods in May 1991" and noted that "[a]ny special order agreements relative to compliance with water quality standards" approved by the Board would "take precedence over the VPDES Permit." Oct. 10, 1991 Letter from Board to Smithfield at 2, ¶ 3. While the Board does state here that the agreements in the Special Orders take precedence over the Permit, the text of this letter contradicts defendants' assertion that the Permit incorporated the Special Orders, as the Board considered the Permit and Special Orders to be "separate document[s]." *Id.* Even if this court opined that the EPA was bound by the Board's statement that the Special Orders "take precedence" over the Permit, which it does not, the court has already determined that the May, 1991 Special Order did not exempt defendants from the phosphorus compliance deadlines, if they elected to connect to HRSD.[27] Thus, the court disagrees with defendants that "[t]he clear import of the Board's response [in the October 10, 1991 letter] is that so long as Smithfield remained committed to connecting to HRSD, the Permit terms were superseded by the terms of the 1991 Order and that Smithfield would comply with the 1992 Permit so long as it satisfied the terms of the 1991 Order." Defs.' Br. at 11.

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[27] *See supra* Part II.B. 1. In addition, as noted previously, defendants' own contemporaneous interpretation of the May, 1991 Special Order is that relief from compliance with the schedule in the 1992 Permit "is not specifically present or is not apparent in the [1991] Consent Order." Oct. 1, 1991 Letter from Smithfield to Board as 3.

Other statements by the Board contemporaneous with the issuance of the 1992 Permit indicate that defendants were still required to comply with its terms. On December 23, 1991, after the May 9, 1991 Special Order was issued, the Board reported to the EPA that defendants' discharge was "expected to meet the required effluent limitations." Dec. 23, 1991 Memorandum Accompanying 1992 Permit at 4. Later, on May 15, 1992, the Board sent a letter to Smithfield reminding it that "the deadline for achieving final effluent limitations [for CBOD, total cyanide, and ammonia-nitrogen] is May 13, 1994." May 15, 1992 Letter from Board to Smithfield. The Board further stated that "[s]hould construction be delayed such that this deadline may be missed, a modification to the existing Consent order should be requested." *Id.* Consequently, the court concludes the Board's contemporaneous interpretation of the 1992 Permit was that defendants were "expected to meet the required final effluent limitations" in the 1992 Permit for phosphorus, TKN, CBOD, total cyanide, ammonia-nitrogen, and the other effluents.[28]

In conclusion, the Board's Special Orders did not change the terms of the 1992 Permit, nor did the 1992 Permit implicitly incorporate any agreements set forth in the Special Orders. This is true notwithstanding the fact that the EPA failed to object to the alleged agreement between the Board and Smithfield even though it had copies of the Board's May, 1991 Special Order and October 10, 1991 letter, and information about defendants' noncompliance with the Permit. De-

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[28] It was not until two years after the issuance of the 1992 Permit that the Board clearly agreed "to hold in abeyance the requirement in Part I.D.6. of the Permit for Smithfield to comply with [final effluent limitations for CBOD, total cyanide, and ammonia-nitrogen] by May 13, 1994." November 8, 1994 Special Order at 1. However, as already discussed herein, the United States is not bound by the Board's Special Orders issued after the 1992 Permit because the Special Orders did not modify the Permit, and because the United States never agreed to be bound by them. *See supra* at 46-51.

fendants never explicitly asked the EPA to approve of their agreement with the Board, and the EPA's failure to comment on this agreement did not endorse the agreement. If defendants wanted to extend the deadline for full compliance for phosphorus, CBOD, total cyanide, and ammonia-nitrogen, or obtain different effluent limitations for TKN, they should have done so by seeking a permit modification. Since the 1992 Permit was not modified, defendants were still required to follow the TKN limitations in the 1992 Permit, and the schedule of full compliance for phosphorus, CBOD, cyanide, and ammonia-nitrogen limitations in the 1992 Permit, or subject themselves to liabffity for permit violations.[29]

C. Estoppel

Defendants contend that the United States is not entitled to summary judgment because it is estopped from enforcing the limitations in the Permit. Estoppel against the United States is permitted, however, only in the most extraordinary circumstances. *Heckler v. Community of Health Services of Crawford County, Inc.*, 467 U.S. 51, 60, 104 S.Ct. 2218, 2224, 81

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[29] Defendants claim that the United States should not seek penalties against defendants because "the federal government itself pursues a policy similar to that pursued by Virginia in this case when it sees fit" and they note that the Supreme Court has recognized that the Administrator of the EPA may issue compliance orders under Section 309(a) of the Act, 33 U.S.C. § 1319(a), agreeing "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Gwalmey of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 61, 108 S.Ct. 376, 383, 98 L.Ed.2d 306 (1987) (Congress did not intend to allow citizens to file suit against a violator, months or years later, "in order to seek the civil penalties that the Administrator chose to forgo," because this would considerably curtail the Administrator's discretion to enforce the Act in the public interest); see Defs.' Br. at 2. Notwithstanding the fact that the EPA may forgo seeking civil penalties with regard to other violators, this does not prevent the EPA from seeking them when the EPA deems that other methods of enforcement are not achieving compliance with the Act in a timely manner, as in this case.

L.Ed.2d 42 (1984). The United States is only estopped from enforcing the Permit if defendants prove: (1) the traditional elements of estoppel are present, id. at 61, 104 S.Ct. at 2224-25; (2) the United States has engaged in affirmative misconduct, *I.N.S. v. Miranda*, 459 U.S. 14, 17, 103 S.Ct. 281, 282-83, 74 L.Ed.2d 12 (1982); and (3) the circumstances are such that "the public interest in ensuring that the [United States] can enforce the law free from estoppel might be outweighed by the countervailing interest of [the private party]." *Heckler*, 467 U.S. at 60-61, 104 S.Ct. at 2224. As defendants have not satisfied the second element required for estoppel against the United States—affirmative misconduct—the court declines to address the other elements.

According to defendants, the United States is estopped from enforcing the limitations in the Permit because the "EPA has been aware for many years of the Board's Special Orders revising Smithfield's obligations," and "[d]iscovery to date demonstrates that the United States acted affirmatively." Defs.' Br. at 15. As discussed in the last section, there is no evidence whatsoever indicating that the EPA ever affirmatively stated to defendants that they were not obliged to comply with the Permit requirements; that the Special Orders changed, or were incorporated into, the Permits; that the EPA agreed to be bound by the Board's Special Orders or letters; or that the EPA approved of the Board's alleged agreement with Smithfield, namely that the latter did not have to comply with the schedule of compliance in the Permit, if it elected to connect to the HRSD, regardless of when this connection occurred.[30] Inaction or passivity of the EPA is not affirmative misconduct with respect to defendants' violations. Thus, because defendants have failed to present any evidence of affirmative misconduct by the EPA, they are not entitled to the defense of estoppel against the United States.

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[30] *See supra* Part II.B.2.

D. Claims for civil penalties and injunctive relief are not barred by Section 309(g) (6) (A)(ii) of the Clean Water Act

Defendants assert that the United States' claims for civil penalties and injunctive relief[31] are barred by Clean Water Act § 309(g)(6)(A)(ii), § 309(g)(6)(A)[32] because for the last ten years the Commonwealth, by issuing Special Orders, has commenced and is diligently prosecuting an administrative action against Smithfield under Virginia law that is comparable to Section 309(g). Since Section 309(g)(6)(A) only applies to civil penalty actions, the court finds that the United States' claim for injunctive relief is not barred by this section. *Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection*, 830 F.Supp. 194, 196 (S.D.N.Y.1993). Section 309(g)(6)(A)(ii) of the Act does bar the United States from bringing a civil penalty action for "any violation" whenever a state enforcement agency has "commenced and is diligently prosecuting an action under a State law comparable to this subsection." 33 U.S.C. § 1319(g)(6)(A)(ii).

Rather than include a penalty provision in each subsection of the Virginia statute, as Congress did in the Clean Water Act, Virginia simply created a single penalty provision to govern all violations of Virginia's State Water Control Law. See Va.Code § 62.1-44.32. Therefore, the United States urges the court to compare Section 309(g) to the specific code sec-

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[31] In their Answer, defendants initially only allege that the claims for civil penalties are barred by this section. In their response to the United States' motion, however, they state that the claims for injunctive relief are also barred. Defs. Br. at 27 n. 19.

[32] Although defendants also cite Section309(g)(6)(A)(iii) 33 U.S.C. § 131 9(g)(6)(A)(iii), in their Answer, the United States' suit is clearly not barred by this section, which applies only if "the violator has paid a penalty assessed under [Section 309(g)], or such comparable State law, as the case may be." Defendants do not even allege that they have paid any such penalties, and there is no evidence to this effect.

tion cited by the Commonwealth as its authority for issuing the Special Orders, Virginia Code § 62.1.-44.15(8a), which contains no specific penalty provision. However, this court agrees with defendants that it should compare Section 309(g) to the entire state enforcement scheme. *See, e.g., North and South Rivers Watershed Ass'n. Inc. v. Town of Scituate*, 949 F.2d 552, 555-56 (1st Cir.1991) (court should focus on whether the entire statutory scheme is comparable to the entire Clean Water Act, rather than the individual section of state law, when determining whether a citizen suit is barred); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 777 F.Supp. 173, 182 (D.Conn.1991) (same), *rev'd in part on other grounds*, 989 F.2d 1305 (2nd Cir.1993). *But see Union Oil*, 83 F.3d at 1118 ("the penalty at issue must have been assessed under that provision of the state law that is comparable to [Section 309(g) 1"); *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F.Supp. 1389, 1404 (D.Haw.1995) (same).

The proper focus in determining comparability is on the substance of the law, not its form; the comparability determination should not turn on "the logistical happenstance of statutory drafting." *Scituate*, 949 F.2d at 556. Accordingly, because the court will not elevate form over substance when determining if the state and federal laws are

1. Authority to impose administrative penalties

The United States contends that Virginia law is not comparable to Section 309(g) because it does not provide the Commonwealth with the authority to impose administrative penalties.[33] Section 309(g)(6)(A)(ii) only bars a civil penalties action when a state has commenced and is diligently prosecuting an action under a state law *comparable* to Section 309(g). Section 309(g) is entitled "Administrative penalties," and it *authorizes* the EPA to assess *administrative penalties* for vio-

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[33]The United States also notes that the Board's Special Orders have not required defendants to pay any penalties. *See supra* note 32.

lations of the Act or a permit condition or limitation. Accordingly, a state law is only comparable to Section 309(g), if it *authorizes* the state to assess *administrative penalties* for violations of the Act or of a permit.[34] *See, e.g. Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380—81 (8th Cir.1994) ("comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the *state is authorized* to enforce," along with other provisions) (emphasis added), *cert. denied*, 513 U.S. 1147, 115 S.Ct. 1094, 130 L.Ed.2d 1062 (1995); *Scituate*, 949 F.2d at 556 (finding Massachusetts statutory scheme comparable where it "authorized" the Massachusetts Department of Environmental Protection to assess penalties in a manner similar to Section 309(g) of the Federal Act, even though penalties were not actually sought); *Orange Environment, Inc. v. County of Orange*, 860 F.Supp. 1003, 1014 (S.D.N.Y.1994) (finding New York law comparable to the Act's administrative penalty provisions because "penalties may also be assessed by the Commissioner in the first instance which are subject to review" by a court); *Remington Arms*, 777 F.Supp. at 181 (Section 309(g)(6)(A)(ii) "bars citizen suits where a state agency conducting enforcement proceedings has authority to assess civil penalties, regardless of whether the agency has actually assessed such penalties."); *New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F.Supp. 162, 165 (S.D.N.Y.1991) (noting that New York law allows the state to "seek penalties for violations" of New York's Environmental Conservation Law, but the state is not required to impose penalties for a citizen suit to be precluded).

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[34] Although the court agrees with defendants that the Commonwealth does not have to seek or impose administrative penalties, see Defs.' Br. at 16, Virginia law must still *authorize* the Commonwealth to pursue *administrative penalties*—not just judicial penalties—for the state law to be comparable to Section 309(g), and consequently bar the United States' action for civil penalties under Section 309(g)(6)(A)(ii). *See infra* note 35.

Virginia law provides for the imposition of "civil charges" *only when the violator consents*. Va.Code § 62.1-44.15(8d) ("With the consent of any owner who has violated or failed, neglected or refused to obey any regulation or order of the Board" or any permit condition, "the Board may provide, in an order . . . , for the payment of civil charges for past violations" in specific sums.).[35] A penalty provision requiring the consent of the violator does not have the same "teeth" to encourage enforcement as Section 309(g). As noted by the Supreme Court in *Tull v. United States*, 481 U.S. 412, 422-23, 107 S.Ct. 1831, 1838, 95 L.Ed.2d 365 (1987), civil penalties are very important in the Act's enforcement scheme, as they punish violators, deter violations, and disgorge economic profits derived from the violations.

Although the court recognizes that it is important to grant state enforcement agencies latitude to pursue the remedies they deem most effective in furthering the goals of the Clean Water Act, a state law must be comparable to the administrative penalty provision of the Clean Water Act, Section 309(g), for it to preclude a civil penalty action under Section 309(g)(6)(A)(ii). Virginia law, *requiring the consent of the violator to the penalties, does not authorize the imposition of administrative penalties* in a manner comparable to Section 309(g). Accordingly, the United States is not barred herein from bringing an independent penalty action against defendants.

2. Public notice and participation

Numerous courts have also found that a state law is only comparable to Section 309(g), if it contains public notice and participation rights that are similar to Section 309(g). *See, e.g., California Sportfishing Protection Alliance v. City of*

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[35] Virginia Code § 62.1-44.15(8c) does authorize the Board to pursue civil penalties *in a court of law* under Virginia Code § 62.1-44.32, *but this is a judicial rather than an administrative penalty.*

West Sacramento, 905 F.Supp. 792, 804 (E.D.Cal.1995) (finding California law comparable to Section 309(g) because it has public participation procedures closely analogous to each of the provisions in Section 309(g)(4)); *Save Our Bays and Beaches v. City and County of Honolulu*, 904 F.Supp. 1098, 1133 (D.Haw.1994) (state statutes and regulations which do not contain mandatory safeguards of public notice and participation cannot be deemed comparable to Section 309(g)); *Public Interest Research Group of New Jersey, Inc. v. New Jersey Expressway Authority*, 822 F.Supp. 174, 184 (D.N.J.1992) (finding state law not comparable because the statutes and regulations did not afford the public notice and opportunity to comment or participate in a hearing, like Section 309(g)(4)); *Natural Resources Defense Council Inc. v. Vygen Corp.*, 803 F.Supp. 97, 101 (N.D.Ohio 1992) (Ohio law, which contained discretionary notification and participation provisions, was not comparable to Section 309(g) because it did not contain mandatory public participation safeguards); *Public Interest Research Group of New Jersey, Inc. v. GAF Corp.*, 770 F.Supp. 943, 950-51 (D.N.J.1991) (state law that did not provide public notice, or provide the public an opportunity to comment or request a hearing on a proposed administrative consent order, was not comparable); *Atlantic States Legal Foundation, Inc. v. Universal Tool and Stamping Co., Inc.*, 735 F.Supp. 1404, 1415-16 (N.D.Ind.1990) (state law not comparable where it failed to require notice of matters concluded by consent decree, and did not provide a reasonable opportunity to comment on a proposed penalty assessment or to obtain judicial review of administrative orders similar to Section309(g)(8)). *But see ICI Americas*, 29 F.3d at 381 (agreeing with *Scituate*, and holding state law comparable where it provided an ex post facto right to intervene, no public notice at any time, and no opportunity to comment on a proposed consent order); *Scituate*, 949 F.2d at 556 n. 7 ("So long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State

Act are satisfactorily comparable to those found in the Federal Act.").

Congress provided for the "rights of interested persons" in Section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4). Although a state's statutory or regulatory scheme need not be identical to the federal government's to be "comparable," the state law must provide public notice and participation safeguards similar to those in Section 309(g) to ensure that interested citizens have an opportunity to contest administrative actions. These safeguards include: (1) "public notice and reasonable opportunity to comment on the proposed issuance of an order," Section 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A); (2) the right of persons who commented on the proposed penalty assessment to "notice of any hearing held under this subsection and of the order assessing such penalty," Section 309(g)(4)(B), 33 U.S.C. § 1319(g)(4)(B); (3) if a hearing is held, the commentators have a right to receive "a reasonable opportunity to be heard and to present evidence," *id.*; (4) if a hearing is not held, the commentators may petition the EPA to set aside the order and provide a hearing, Section 309(g)(4)(C), 33 U.S.C. § 1319(g)(4)(C); (5) if a hearing is denied, the EPA must provide notice of and the reasons for the denial, *id.*; and (6) the commentators have a right to appeal an administrative penalty assessment in United States District Court. Section 309(g)(8), 33 U.S.C. § 1319(g)(8).

With regard to public notice and opportunity to comment, Virginia's regulations provide that the Board will investigate and respond to citizen complaints concerning matters within the Board's purview. Va. Admin. Code tit. 9 § 25-31-910(B)(1). The regulations further provide that

> [a]t least 30 days prior to the final settlement of any civil enforcement action or the issuance of any consent special order, the board will publish notice of such settlement or order in a newspaper of general circulation in the county, city or town in which the discharge is located, and The Virginia Register of Regulations. . . .

Id. § 25-31-910(B)(3). The regulations also require the Board to consider all comments received during this thirty-day period before taking final action. *Id.* The United States concedes that the November, 1994 Special Order was published for public comment, as required by Title 9 of Virginia Administrative Code § 25-31-910(B)(3). *See* Pl.'s Br. at 26 n. 19.

With regard to public participation in hearings, there are two types of administrative hearings in the Virginia Administrative Code, informal hearings, referred to as "public hearings," and "formal hearings." Va. Admm. Code tit. 9 § 25-230-10. "Public hearings" are informal fact-finding proceedings "held to afford interested persons an opportunity to submit factual data, argument and proof to the board." *Id.* § 25-230-30. A permit applicant, permittee, or any person may request a public hearing when the Board considers whether to issue, deny, modify, or revoke a permit. *Id.* § 25-230-40. Any person aggrieved by any action or inaction of the Board with respect to a permit or arising out of the public hearing procedures may petition the Commonwealth for a "formal hearing." *Id.* § 25-230-130.

"A formal hearing is a public proceeding for the taking of evidence . . . " *Id.* § 25-230-100. "A formal hearing may be held to consider appeals of certain actions of the board . . . taken without a formal hearing," and "must be held prior to the issuance of a special order ... unless the owner consents to the issuance of a special order without a hearing." *Id.*[36] If the owner does not consent to the issuance of a special order without a formal hearing, and a formal hearing is held, "the only party to a special order hearing shall be the proposed recipient of the special order." *Id.* § 25-230-120.

Thus, it appears that, under Virginia law, a citizen can petition for either a public or formal hearing, only if the griev-

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[36] "A consent special order is a special order issues without a public hearing and with the written consent of the affected owner." Va. Admin. Code tit. 9 § 25-31-910(B)(3).

ance is with respect to an action or inaction of the Board in issuing, denying, modifying, or revoking a permit. However, *a grievance with the issuance of a special order is not a permit grievance*. There appears to be no provision allowing a citizen to petition for either a public (informal) hearing, or formal hearing, if a citizen has a grievance with respect to the proposed issuance of a special order. Moreover, a formal hearing regarding the proposed issuance of a special order may never be held because the recipient of that special order can waive the formal hearing. Then, even if a formal hearing is held regarding the proposed issuance of a special order, the only party at that special order hearing is the recipient of that special order.

In this case, Smithfield consented to the issuance of the Special Orders without a hearing, and there was no opportunity for the public to request a hearing prior to their issuance. Defendants maintain that a state law need not provide hearings in all cases to be comparable to Section 309(g), because even Section 309(g)(4) does not require a hearing—it only allows interested persons to comment, if a hearing is held, or petition the EPA for a hearing, if one is not held. Section 309(g)(4)(C), however, does require "notice of and the reasons for" the denial of a hearing. Virginia law, which allows the violator to waive a formal hearing, does not contain similar provisions protecting the public's right to request a hearing prior to issuance of a special order, to be heard and present evidence if a hearing is held on the proposed issuance of a special order, and to obtain an explanation if a hearing is not held.

In addition, at the time the Special Orders were issued, there was also no Virginia law counterpart to the public's opportunity to obtain judicial review under Section 309(g)(8). Although any violator "aggrieved by a final decision of the Board" under 62.1-44.15(8a) was "entitled to judicial review," Va.Code § 62.1-44.29 (1992 Replacement Volume),

Virginia law provided no similar right to any other persons. *Town of Fries v. State Water Control Board*, 13 Va.App. 213, 216, 409 S.E.2d 634 (1991).[37]

Virginia law does provide the public with notice and some opportunity for comment, but the court finds that Virginia law at the time of the issuance of the Special Orders did not include public participation provisions sufficiently comparable to Section 309(g). Unlike Section 309(g), Virginia law did not grant the public a right to request a hearing prior to issuance of a special order, to be heard at a hearing regarding the proposed issuance of a special order, to obtain reasons for denial of a hearing, or to seek judicial review of a special order. Consequently, this court does not find Virginia's public participation procedures at the time of the issuance of the Special Orders to be sufficiently similar to Section 309(g).[38]

In conclusion, Virginia's entire enforcement scheme is not comparable to Section 309(g) because it does not provide authority to issue administrative penalties and because it failed, at the time of the Special Orders, to provide adequate procedures for public participation. Because the court concludes that Virginia law is not comparable to Section 309(g), and

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[37] After the Fourth Circuit in *Commonwealth of Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), *cert. denied*, — U.S. —, 117 S.Ct. 764, 136 L.Ed.2d 711(1997), upheld the EPA's disapproval of the citizen standing provisions of the Virginia Code, the Commonwealth amended Section 62.1-44.29 of the Virginia Code in 1996. This amendment, effective January 1997, now allows the violator and "any person who has participated, in person or by submittal of written comments" to appeal a special order. Supplement to January 6, 1995 Virginia Attorney General's Opinion at 2, 5 (dated Feb. 6, 1997) (Pl.'s Ex. 26). Because this amendment was not in effect when the Special Orders were issued, or when this Complaint was filed, it is not relevant to the court's determination of whether the state law was comparable to federal law at the time of the state's enforcement action.

[38] This conclusion is consistent with Congress' intent to provide for, encourage, and assist the participation of the public in the enforcement of the Act. Section 101(e), 33 U.S.C. § 1251(e).

thus does not bar the United States from pursuing an independent penalty action against defendants, the court need not address whether the Commonwealth is diligently prosecuting an administrative action against defendants.

E. Phosphorus claims not precluded by Section 510 of the Act

In their response to the United States' motion, defendants contend that Section 510 of the Act, 33 U.S.C. § 1370, precludes federal enforcement of the United States' phosphorus-based claims. The court agrees with the United States that this argument "is completely unsupported by the language of Section 510 and flatly inconsistent with the language, intent, and structure of Sections 309(a) and 301 of the Clean Water Act, 33 U.S.C. §§ 1319(a), 1311." Pl.'s Rebuttal at 16.

Section 510 of the Act states that the Act does not preclude or deny the right of any state to adopt or enforce standards, limitations, or requirements that are more stringent than federal law. 33 U.S.C. §1370(1)(A) and (B). The Commonwealth of Virginia has adopted stricter standards, limitations, and requirements for the discharge of phosphorus than required by the Act, and it included these phosphorus limitations in defendants' Permit. In filing this action alleging violations of the phosphorus limits, defendants contend that the United States is contravening "the clear mandate of Section 510 by denying Virginia its right to enforce without federal interference more stringent state standards and requirements than it created itself." Defs.' Br. at 29. The court disagrees.

The Commonwealth's phosphorus limitation, which is a standard within the meaning of Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), was incorporated into defendants' NPDES Permit issued pursuant to Section 402, 33 U.S.C. § 1342. Defendants admit that the EPA has the authority to enforce a more stringent state effluent standard incorporated into a permit approved by the EPA. Defs.' Br. at 29 (citing 33

U.S.C. § 1319(a)(1) and (3)). Thus, because the plain language of Section 309(a)(1) and (3), 33 U.S.C. § 1319(a)(1) and (3), clearly provides that the United States may enforce the phosphorus standard in defendants' Permit, the court concludes that Section 510, 33 U.S.C. § 1370, does not preclude the United states from pursuing their phosphorus-based claims against defendants in this action.

III. Conclusion

As a matter of law, the court GRANTS partial summary judgment to the United States against defendants for several reasons. First, defendants are liable for violations of Clean Water Act § 309(b) and (d), 33 U.S.C. § 1319(b) and (d). Specifically, Smithfield Foods is liable for at least 164 days of violations of the reporting requirements of Permit No. VA0059005 (Count V); and defendants Smithfield Foods, Smithfield Packing, and Gwaltney are liable for any violations of the effluent limitations contained in Permit No. VA0059005 for: phosphorus, ammonia-nitrogen, TKN, fecal coliform, minimum pH, cyanide, oil and grease, CBOD, BOD, and total suspended solids (Counts I-IV). Second, Permit No. VA0059005 did not incorporate, nor was it conditioned, revised, or superseded by, the Board's Special Orders issued prior to the filing of this action. Third, the United States' claims are not barred by estoppel. Fourth, the United States' claims are not barred by Clean Water Act § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A). Fifth, the United States' phosphorus claims are not precluded by Clean Water Act § 510, 33 U.S.C. § 1370.

The Clerk is DIRECTED to send a copy of this Opinion to counsel for the parties.

It is so ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2709
CA-96-1204-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SMITHFIELD FOODS, INCORPORATED,
SMITHFIELD PACKING COMPANY, INCORPORATED,
GWALTNEY OF SMITHFIELD, LTD.
Defendants-Appellants.

MICHIGAN CHAMBER OF COMMERCE; PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY; COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY; AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION; AMERICAN MEAT INSTITUTE; AMERICAN PETROLEUM INSTITUTE; INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA; INTEGRATED WASTE SERVICES ASSOCIATION; NATIONAL ASSOCIATION OF MANUFACTURERS,
Amici Curiae

Filed January 6, 2000

ON PETITION FOR REHEARING EN BANC

The Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the court,

/s/ Patricia S. Connor
Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 301
479-3071

March 27, 2000

Mr. Patrick Raher
Hogan & Hartson
555 Thirteemth Street, NW
Washington, DC 20004

Re: Smithfield Foods, Inc., et al.
v. United States
Application No. 99A792

Dear Mr. Raher:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on March 27, 2000, extended the time to and including May 5, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER,
Clerk

By

SANDRA ELLIOTT SPAGNOLO
Assistant Clerk

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Title 33, United States Code

§ 1319. Enforcement

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * *

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections

in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary, the Administrator or Section, as the case may be, may, after consultation with the State in which the violation occurs, access a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the

maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and

of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finalty of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(c). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not af-

fect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section

1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assess-

ment of the penalty constitutes an abuse of direction and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or the Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or

documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for the district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirements respecting control or abatement of pollution; except that if an effluent limitation, or other standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

(2)

No. 99-1760

Supreme Court, U.S.
FILED
JUL 05 2000
CLERK

In the Supreme Court of the United States

SMITHFIELD FOODS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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26pp

QUESTIONS PRESENTED

1. Whether the United States may bring a civil enforcement action under the Clean Water Act against petitioners for violations of a National Pollutant Discharge Elimination System (NPDES) permit that contains both federally mandated and state mandated effluent limitations.

2. Whether Section 309(g)(6)(A) of the Clean Water Act, which provides that a person shall not be subject to a judicial action for civil penalties if a State has prosecuted an administrative penalty action under State law that is "comparable" to federal law (33 U.S.C. 1319(g)(6)(A)), precludes the government's civil penalty suit in this case.

3. Whether petitioners received fair notice of their obligation under the Clean Water Act to comply with the effluent limitations in their NPDES permit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Arkansas Wildlife Fed'n v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), cert. denied, 513 U.S. 1147 (1995)	17
Citizens for a Better Environment v. *Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996), cert. denied, 519 U.S. 110 (1997)	18, 20
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987)	3, 12, 13
Harmon Indus., Inc. v. *Browner*, 191 F.3d 894 (8th Cir. 1999)	14, 15
North & S. Rivers Watershed Ass'n v. *Town of Scituate*, 949 F.2d 552 (1st Cir. 1991)	17, 18
United States v. *Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997), cert. denied, 524 U.S. 952 (1998)	18

Statutes and regulations:

Clean Water Act, 33 U.S.C. 1251 *et seq.*	2
§ 101(a), 33 U.S.C. 1251(a)	2
§ 117, 33 U.S.C. 1267	5
§ 301, 33 U.S.C. 1311	3, 11, 14
§ 301(a), 33 U.S.C. 1311(a)	2
§ 301(a)-(b), 33 U.S.C. 1311(a)-(b)	11
§ 301(b), 33 U.S.C. 1311(b)	11
§ 301(b)(1)(C), 33 U.S.C. 1311(b)(1)(C)	11, 14
§ 308, 33 U.S.C. 1318	3
§ 309, 22 U.S.C. 1319	3, 11
§ 309(a), 33 U.S.C. 1319(a)	12, 14

Statutes and regulations—Continued: Page

§ 309(a)(1), 33 U.S.C. 1319(a)(1) 3, 11
§ 309(a)(3), 33 U.S.C. 1319(a)(3) 3, 12
§ 309(b), 33 U.S.C. 1319(b) 3, 4
§ 309(d), 33 U.S.C. 1319(d) 3, 4, 19
§ 309(g), 33 U.S.C. 1319(g) 3, 4, 9, 15, 16, 18
§ 309(g)(1)(A), 33 U.S.C. 1319(g)(1)(A) 3
§ 309(g)(2), 33 U.S.C. 1319(g)(2) 16
§ 309(g)(4), 33 U.S.C. 1319(g)(4) 4
§ 309(g)(6), 33 U.S.C. 1319(g)(6) 4
§ 309(g)(6)(A), 33 U.S.C. 1319(g)(6)(A) 4, 15, 18
§ 309(g)(6)(A)(ii), 33 U.S.C. 1319(g)(6)(A)(ii) 9, 15, 16, 17
§ 309(g)(8), 33 U.S.C. 1319(g)(8) 16
§ 402, 33 U.S.C. 1342 ..... 3, 11
§ 402(a), 33 U.S.C. 1342(a) 20
§ 402(a)(5), 33 U.S.C. 1342(a)(5) 20
§ 402(b), 33 U.S.C. 1342(b) 3, 20
§ 402(b)(1)(C), 33 U.S.C. 1342(b)(1)(C) 20
§ 402(b)(3), 33 U.S.C. 1342(b)(3) 20
§ 402(c)-(d), 33 U.S.C. 1342(c)-(d) 3
§ 402(d), 33 U.S.C. 1342(d) 3
§ 402(i), 33 U.S.C. 1342(i) 4, 15
§ 505, 33 U.S.C. 1365 12
§ 510, 33 U.S.C. 1370 ..... 9, 14
Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 note (Supp. IV 1998) 4
Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note 4
Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* 14
42 U.S.C. 6926(b) 15
42 U.S.C. 6926(d) 15
Ark. Code Ann. § 8-4-103(c) (Michie 2000) 17
Mass. Gen. Laws ch. 21A, § 16 (1996) 17
9 Va. Admin. Code (2000):
§§ 25-40-10 *et seq.* 5
§ 25-260-350(18) 5

Statute and regulations—Continued: Page

Va. Code Ann. § 62.1-44.15(8d) (Michie 1998) 16
40 C.F.R.:
Section 19.4 4
Section 122.62 20
Section 123.25 20
Section 124.5(c)(1) 20
Section 124.6(e) 20

In the Supreme Court of the United States

No. 99-1760

SMITHFIELD FOODS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 191 F.2d 516. The opinion of the district court granting the United States' motion for partial summary judgment on liability (Pet. App. 63a-113a) is reported at 965 F. Supp. 769. The opinion of the district court assessing a penalty (Pet. App. 29a-62a) is reported at 972 F. Supp. 338.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1999. A petition for rehearing was denied on January 6, 2000 (Pet. App. 114a-115a). On March 27, 2000, the Chief Justice extended the time for filing a petition for certiorari to and including May 5, 2000, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this civil action against petitioners to enforce provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, which petitioners had frequently violated from 1991 to 1997. The Clean Water Act generally prohibits any pollutant discharges into waters of the United States except in compliance with the Act's permitting scheme. Petitioners obtained a Clean Water Act permit, but repeatedly discharged wastewater containing illegal levels of fecal coliform, phosphorus, and other pollutants into the Pagan River, a tributary of the James River, in violation of the permit conditions. In addition, during the same period, petitioners submitted false reports and destroyed documents to hide their unlawful discharges from state and federal agencies. The district court rejected petitioners' various arguments in defense of their permit violations, and the court assessed a civil penalty of $12.6 million. The court of appeals affirmed the finding of liability but remanded the case for a minor adjustment in the amount of the penalty.

1. The Clean Water Act is a comprehensive statute, administered primarily by the Environmental Protection Agency (EPA), that seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. 1251(a). The Act's central mechanism for meeting that objective is Section 301(a), which prohibits the discharge of pollutants into the waters of the United States by any person except as authorized by specified sections of the Act. 33 U.S.C. 1311(a).

Section 402 of the Act provides one of the primary means for obtaining authorization to discharge pollutants. Section 402 establishes a permitting program known as the National Pollutant Discharge Elimination System (NPDES). Under the NPDES permitting program, persons (including commercial and industrial facilities) may obtain a permit allowing pollutant discharges in accordance with prescribed conditions, including effluent limitations, and monitoring and reporting requirements. See 33 U.S.C. 1311, 1318, 1342; see generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987). EPA has primary responsibility for administering the NPDES permit program, but Section 402(b) provides that a State can establish and administer its own NPDES program if the state program conforms to federal guidelines and receives EPA's approval. Nevertheless, Section 402 requires EPA to exercise continuing oversight of EPA-approved permitting programs. See 33 U.S.C. 1342(c)-(d). For example, a State may not issue a permit if EPA objects. If the State refuses to issue a permit acceptable to EPA, EPA may issue an appropriate permit. See 33 U.S.C. 1342(d).

Section 309 of the Clean Water Act, 33 U.S.C. 1319, provides a variety of means for the United States and the States to enforce provisions of the Act, including provisions authorizing EPA to commence a civil enforcement action in court, 33 U.S.C. 1319(b), or to initiate administrative penalty proceedings, 33 U.S.C. 1319(g). EPA's enforcement authority is not limited to EPA-issued permits. EPA may enforce any conditions of state-issued NPDES permits that implement the relevant provisions of the Clean Water Act. 33 U.S.C. 1319(a)(1) and (3), (b), (d), and (g)(1)(A). See *Gwaltney*, 484 U.S. at 53 ("The holder of a state NPDES permit is

subject to both federal and state enforcement action for failure to comply."); see also 33 U.S.C. 1342(i) (providing that federal enforcement is not limited by the existence of a state permitting program).

Section 309(b) specifically authorizes the United States to seek injunctive relief, 33 U.S.C. 1319(b), while Section 309(d) additionally authorizes the courts to impose civil penalties of up to $25,000 per day for each violation, 33 U.S.C. 1319(d).[1] Section 309(g) authorizes EPA to assess administrative penalties in substantially smaller amounts. 33 U.S.C. 1319(g). Section 309(g)(4) provides extensive and detailed procedures for public participation in the administrative penalty assessment process, including a right of public notice and comment, the right of any interested persons to petition for a hearing, and the right of interested persons to present evidence if a hearing is held. 33 U.S.C. 1319(g)(4).

Section 309(g)(6) of the Clean Water Act addresses the issue of whether the prosecution of a federal or state administrative penalty action should preclude a judicial enforcement action. See 33 U.S.C. 1319(g)(6). Section 309(g)(6)(A) provides that, if EPA or a State has commenced and is diligently prosecuting, or has successfully completed, an administrative penalty action under subsection (g) or a comparable state law, the violations at issue shall not be the subject of a citizen suit or a civil penalty action under Section 309(d). 33 U.S.C. 1319(g)(6)(A).

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[1] For violations occurring after January 30, 1997, the maximum penalty is $27,500 per day. 40 C.F.R. 19.4 (implementing Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 note (Supp. IV 1998) (Pub. L. No. 104-134), and Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note (Pub. L. No. 101-410).

2. Petitioners operate neighboring pork processing and packing plants in Smithfield, Virginia. The two plants generate wastewater containing animal blood, hair, viscera, excrement, flesh, bone, soil particles, and cleaning materials. The wastewater is high in organic pollutants, including fecal coliform, ammonia, nitrogen, and phosphorus. Pet. App. 38a-42a, 45a; PX 2.

Until 1997, petitioners discharged their wastewater into the Pagan River, a tributary of the James River, pursuant to an NPDES permit issued by the Commonwealth of Virginia in 1986, modified in 1990, and reissued in 1992. The 1992 permit contained monthly average and/or daily maximum effluent limitations on numerous pollutants. The permit also imposed monitoring, reporting, and record-keeping requirements. Pet. App. 64a-67a, 72a-73a.

In 1987, Virginia entered into the historic Chesapeake Bay Agreement with EPA, Pennsylvania, Maryland, and the District of Columbia. See 33 U.S.C. 1267 (establishing Chesapeake Bay Program Office within EPA). Under that Agreement, Virginia committed to reduce by 40% the amount of nitrogen and phosphorus entering the Chesapeake Bay. To fulfill its obligations under the Agreement, Virginia promulgated a Policy for Nutrient Enriched Waters, which required that NPDES permits for facilities discharging into nutrient-enriched waters (of which the Pagan River is one) be modified to include phosphorus limits. See 9 Va. Admin. Code §§ 25-40-10 *et seq.* (2000); *id.* § 25-260-350(18). Petitioners sued Virginia, alleging that the phosphorus limitation was not technologically achievable. Pet. App. 67a. Virginia nevertheless modified petitioners' permit in 1990 to impose discharge and monitoring requirements on phosphorus and nitrogen. Petitioners appealed the permit and threatened to

move their plants and their 3,000 jobs out of Virginia. *Id.* at 67a; PXs 7, 8.

Beginning in 1990, petitioners and the Virginia State Water Control Board (Board), which administers Virginia's NPDES permit program, entered into a series of agreements, termed "Special Orders," requiring petitioners to study the costs and feasibility of connecting their wastewater system to the Hampton Roads Sanitation District (HRSD), rather than discharging directly to the Pagan River. Pet. App. 3a-8a, 66a-69a. After petitioners' consultant found that connecting to HRSD was the most cost-effective method for petitioners to meet their current and future pollution control obligations, petitioners elected to connect to HRSD. PX 21, § 6. The Board and petitioners entered into a Special Order (the May 1991 Order) stating that if petitioners elected to connect to HRSD, they were to do so within three months of notification that a sewer line was available to collect their wastewater. Pet. App. 69a. The order expressly provided that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in" petitioners' NPDES permit. *Id.* at 70a.

Because petitioners' permit was due to expire in 1991, the Board prepared a draft permit and submitted it for EPA review and public comment. The draft permit required petitioners, among other things, to come into compliance with the 2 mg/l phosphorus limitation by January 4, 1993, and to comply with effluent limits on ammonia, carbonaceous biological oxygen demand (CBOD), and cyanide by May 13, 1994. EPA reviewed and approved the draft permit. Pet. App. 70a, 72a-73a. Petitioners commented on the draft permit, claiming that they could not comply with the draft permit's deadlines for compliance with effluent limits on

phosphorus, CBOD, ammonia, and cyanide, and noting that "[r]elief from such compliance is not specifically present or is not apparent in the [May 1991] Consent Order." *Id.* at 71a. In response, an engineer at a regional office of the Board wrote to petitioners that "[a]ny special order agreements relative to compliance with water quality standards, the Permit regulation and associated studies that have been approved by the Board take precedence" over the Permit. *Id.* at 72a. That letter also stated that "[t]he compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations." *Ibid.*

On January 3, 1992, the Board issued petitioners' NPDES permit. Despite petitioners' comments, the permit still contained effluent limitations on phosphorus, CBOD, ammonia, and cyanide. Petitioners did not appeal the 1992 permit, nor have they ever sought to modify those requirements to which they had objected. Pet. App. 72a-74a.

3. Petitioners proceeded to violate every single effluent limitation in their permit. They violated those limitations thousands of times and often by extreme margins. Pet. App. 34a. For example, petitioners' violations of the fecal coliform limits averaged 1,365% of the permitted level. For ammonia, the violations averaged 97% above the limit; for cyanide, the exceedences averaged 168% above the limit. Petitioner's phosphorus exceedences were, on average, 1055% above the limit. *Id.* at 38a. The district court characterized petitioners' violations as "frequent and severe." *Id.* at 39a.

Petitioners also committed serious violations of the reporting and recordkeeping requirements of its permit. Petitioners admitted to submitting false monitoring reports on 15 occasions, Pet. App. 30a, and acknowl-

edged filing reports late, for a total of 164 days of violation, *id.* at 36a. Petitioners were also out of compliance with the record-keeping requirements of their NPDES permit for 884 days because a Smithfield employee, witnessed by two other employees, illegally destroyed petitioners' pre-1994 required documentation. *Id.* at 34a-35a, 55a-56a.

4. The United States filed this enforcement action against petitioners on December 16, 1996, seeking injunctive relief and civil penalties. The United States moved for summary judgment on liability. The United States pointed out that petitioners' monitoring reports established that they had violated their NPDES permit numerous times. In response, petitioners argued that they were not in violation of the permit's phosphorus limitations because the permit was "conditioned, revised, or superseded" by the Board's May 1991 Order. Pet. App. 95a. The district court rejected that argument.

The district court pointed out that the May 1991 Order explicitly stated that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in" petitioners' permit. Pet. App. 95a. The court also noted that petitioners' argument was inconsistent with the Board's express inclusion of phosphorus limitations in the 1992 permit. "The Board's Special Orders or letters dated *before* the issuance of the 1992 Permit cannot logically change the terms of a more recent Permit approved by the Board and the EPA." *Id.* at 96a. The court carefully reviewed the events leading up to the issuance of the 1992 permit, *id.* at 96a-100a, and it concluded that "the Board's Special Orders did not change the terms of the 1992 Permit, nor did the 1992 Permit implicitly incorporate

any agreements set forth in the Special Orders," *id.* at 100a.

The district court next rejected (Pet. App. 103a-112a) petitioners' claim that the Board's series of administrative orders, permitting petitioners to choose their method of compliance with the phosphorus limitation, amounted to an administrative penalty proceeding under state laws that are "comparable" to Section 309(g) of the Clean Water Act and precluded EPA from enforcing the phosphorus limitation. See 33 U.S.C. 1319(g)(6)(A)(ii). The court noted that, at the time of the Board's actions, Virginia law permitted imposition of administrative penalties only with the consent of the violator (Pet. App. 104a-106a) and that the state law's provisions for public notice and participation did not permit the public to request a hearing or to be present if one was held, or to seek judicial review of the result (*id.* at 106a-111a). Therefore, the court held, the state law under which the Board acted was insufficiently "comparable" to Section 309(g), see 33 U.S.C. 1319(g)(6)(A)(ii), to bar the federal government's civil enforcement action. Pet. App. 104a-112a.

Finally, the district court rejected (Pet. App. 112a-113a) petitioners' argument that Section 510 of the Clean Water Act, which allows States to impose discharge limitations that are more stringent than federal law would require, see 33 U.S.C. 1370, prevents federal enforcement of the phosphorus limitations in petitioners' NPDES permit. The court explained that "the plain language of Section 309(a)(1) and (3) * * * clearly provides that the United States may enforce the phosphorus standard in [petitioners'] Permit" and that Section 510 accordingly "does not preclude the United States from pursuing their phosphorus-based claims

against [petitioners] in this action." Pet. App. 112a-113a.

The district court accordingly granted partial summary judgment for the United States on the effluent limitation violations. Pet. App. 113a. The court later granted partial summary judgment for the United States on two additional counts relating to filing false reports and destruction of documents. *Id.* at 29a-30a, 34a-35a. After a bench trial on penalty issues, the court found petitioners liable for 6,982 days of violation, *id.* at 36a, and it assessed a penalty of $12.6 million, *id.* at 62a.

5. The court of appeals affirmed the finding of liability in a unanimous opinion, but remanded the case for recalculation of the civil penalty. Pet. App. 1a-28a. The court of appeals endorsed and adopted the district court's reasoning on liability. *Id.* at 11a-16a. The court of appeals specifically "concur[red] with the district court that (1) the Board's Orders were not incorporated into nor changed the terms of the 1992 Permit; (2) Virginia's enforcement scheme is not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent penalty action; and (3) neither the Supreme Court's ruling in *Gwaltney*, nor § 510 of the [Clean Water Act] preclude the EPA from bringing this enforcement action." *Id.* at 15a-16a (footnote omitted). The court of appeals extensively discussed petitioners' numerous challenges to the civil penalty assessment and rejected all of the claims but one. *Id.* at 16a-28a. The court of appeals remanded the case to the district court to correct a calculation error that would reduce the penalty by an amount of less than $200,000. *Id.* at 25a-26a. The court, without dissent, denied petitioners' request for rehearing and rehearing en banc. *Id.* at 114a-115a.

ARGUMENT

Contrary to petitioners' characterization (see Pet. 3-4), this case simply involves egregious conduct rather than momentous legal issues. Petitioners committed "frequent and severe" violations of their NPDES permit. Pet. App. 39a. The district court, in a comprehensive opinion, rejected petitioners' justifications for their numerous and extreme violations, a unanimous court of appeals panel affirmed, and, in response to petitioners' request for en banc review, no member of the court of appeals requested a poll. The court of appeals' decision is correct, it does not conflict with the decisions of this Court or any other court of appeals, and it does not present any issue of broad public importance requiring this Court's resolution. Further review is not warranted.

1. The Clean Water Act authorizes EPA to enforce effluent limitations in NPDES permits, including effluent limitations contained in state-issued NPDES permits that are derived from state law. See 33 U.S.C. 1311(a)-(b), 1319(a)(1) and (3).[2] Petitioners nevertheless

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[2] The Clean Water Act unambiguously expresses that principle. Section 301, entitled "Effluent limitations," states: "Except as in compliance with this section and [six other enumerated sections of the Clean Water Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. 1311(a). Section 301(b) then sets a timetable for achievement of federal technology-based effluent limitations and additionally provides that: "In order to carry out the objective of this chapter there shall be achieved * * * any more stringent limitation * * * established pursuant to any State law or regulations." 33 U.S.C. 1311(b) and (b)(1)(C). Section 309 provides that the EPA may bring an enforcement action against "any person [that] is in violation of [Section 301 or other enumerated sections of the Clean Water Act] or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under [Section 402] of this title by [EPA] or by a

argue that the plain language of the Act, authorizing EPA to enforce state-imposed effluent limitations, should yield to a proposition they derive from this Court's decision in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). Petitioners contend that "Congress * * * gave the States primary authority to enforce the limits in the permits they issue" (Pet. 12) and that this Court's decision in *Gwaltney* "made clear that a penalty action brought under the [Clean Water Act] should not be permitted to undermine the efforts of the primary regulatory authority" (Pet. 13). Petitioners' reliance on *Gwaltney* is misplaced.

The Court held in *Gwaltney* that Section 505 of the Clean Water Act, 33 U.S.C. 1365, which authorizes private citizens to bring civil enforcement actions against any person "alleged to be in violation" of the Act, does not apply to wholly past violations. See 484 U.S. at 56-59. The Court concluded that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57. The Court determined, from the language and structure of the citizen suit provisions as a whole, that "the citizen suit is meant to supplement rather than to supplant governmental action." *Id.* at 59-60. It hypothesized a situation in which citizens

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State." 33 U.S.C. 1319(a)(3). EPA's statutory authority is accordingly quite clear. Indeed, petitioners conceded in their opening brief in the court of appeals that Section 309(a) "give[s] EPA the general authority to enforce permits, including, *inter alia*, permits containing more stringent standards under state law." Appellant C.A. Br. 37-38. They made the same concession to the district court. See Pet. App. 112a-113a.

brought suit to obtain civil penalties for wholly past violations that EPA had abated through a compliance order in which the government did not seek civil penalties in exchange for the violator's agreement to "take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 61. The Court concluded that the citizen's action in such circumstances would curtail EPA's ability to enforce the Act and "could undermine the supplementary role envisioned for the citizen suit." *Id.* at 60.

Petitioners assert, based on those remarks, that *Gwaltney*'s reasoning should preclude *the United States* from seeking civil penalties for past violations of a state-issued NPDES permit that imposes more stringent conditions than EPA might require. Pet. 13-14. Petitioners overlook that the Clean Water Act expressly authorizes the United States to take such action, see p. 11 & note 2, *supra*. The *Gwaltney* decision—which discussed the relationship between governmental and citizen enforcement—does not address the relationship between federal and state enforcement. Sections 301 and 309 expressly address *that* issue, they recognize that the federal government can enforce state-issued NPDES permits, and they authorize the United States to bring an enforcement action in this case. See Pet. App. 14a-16a.[3]

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[3] Even if *Gwaltney* had a bearing of the relationship between federal and state enforcement, the factual situations presented in the *Gwaltney* hypothetical and the case presented here are plainly distinguishable. This case is *not* one in which petitioners were pressured by the threat of penalties to choose a more expensive treatment method than they would otherwise have chosen out of economic self-interest. The record is quite clear that Virginia allowed petitioners to choose their method of compliance, and they

Petitioners also argue that Section 510 of the Clean Water Act, 33 U.S.C. 1370, effectively grants the States the exclusive authority to enforce more stringent state law standards. Pet. 14-15. As the district court explained, however, petitioners' interpretation is "completely unsupported by the language of Section 510 and flatly inconsistent with the language, intent, and structure of Sections 309(a) and 301 of the Clean Water Act." Pet. App. 112a.

Section 510 states that "[e]xcept as expressly provided in this chapter," the Clean Water Act does not "preclude or deny the right of any State * * * to adopt or enforce" its own more stringent effluent limits. 33 U.S.C. 1370. Sections 301(b)(1)(C) and 309(a) expressly provide that EPA may enforce effluent limitations in NPDES permits that are based on more stringent state standards. See pp. 3-4, 9-10, 11 & note 2, *supra*. Therefore, even if petitioners were correct in characterizing the federal government's enforcement action in this case as curtailing Virginia's discretion not to enforce the state standards, the Clean Water Act has "expressly provided" for the federal government to take that action. The United States' action in this case accordingly does not contravene Section 510. See Pet. App. 14a-16a, 112a-113a.[4]

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chose to connect to HRSD for reasons of cost-effectiveness and future flexibility. See Pet. App. 3a-8a.

[4] Petitioners err in arguing (Pet. 16) that the court of appeals' decision here is in tension with the Eighth Circuit's decision in *Harmon Industries, Inc.* v. *Browner*, 191 F.3d 894 (1999). *Harmon* involved a federal enforcement action under a different statute, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.* RCRA provides for shared federal-state responsibilities, but its text differs from that of the Clean Water Act in several respects. For example, RCRA provides that a state

2. Petitioners next argue that the Board's issuance of a series of Special Orders directing petitioners to choose a method of compliance with the phosphorus limitation constitutes an administrative penalty action, diligently prosecuted under comparable state law, that bars the United States from bringing this federal enforcement action. Pet. 17-24. Petitioners base that argument on Section 309(g)(6)(A)(ii) of the Clean Water Act, which provides that no civil penalty action may be brought for violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to" Section 309(g), which prescribes the Clean Water Act's mechanism for EPA to assess administrative penalties. See 33 U.S.C. 1319(g)(6)(A). The courts below correctly rejected that argument. See Pet. App. 13a-14a, 15a-16a, 103a-112a.

The district court carefully examined the Virginia laws in effect at the time that the Board issued its orders, and it concluded that the state laws under which the Board acted were not sufficiently comparable to the Clean Water Act to trigger Section 309(g)(6)(A)'s limit-

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hazardous waste program operates "in lieu of" a federal hazardous waste program and that authorized state actions have the "same force and effect" as actions by EPA. 42 U.S.C. 6926(b) and (d). The Eighth Circuit decided in *Harmon* that those RCRA provisions precluded EPA from taking a RCRA enforcement action under the facts of that case. 191 F.3d at 898. The United States believes that *Harmon* was wrongly decided. Regardless of its merits, however, *Harmon* is irrelevant to this case because the Clean Water Act contains different and additional language expressly stating that state NPDES programs under the Clean Water Act do *not* preempt federal enforcement. See 33 U.S.C. 1342(i) (providing that "[n]othing in this section [relating to state NPDES programs] shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 ["Enforcement"] of this title").

ation. Pet. App. 111a-112a. As the district court pointed out, Section 309(g) authorizes the Administrator of the EPA to assess nonconsensual penalties of up to $10,000 per day, 33 U.S.C. 1319(g)(2), and allows both the violator and other "interested persons" to request and participate in a hearing or seek judicial review of the administrative penalty, 33 U.S.C. 1319(g)(8). By contrast, the Board in this case acted under Virginia laws that gave the Board no authority to impose administrative penalties on a violator without the violator's consent, Va. Code Ann. § 62.1-44.15(8d) (Michie 1998), and that did not allow anyone other than the violator to request a hearing or to seek judicial review of administrative penalty actions. See Pet. App. 13a-16a, 104a-112a.

Given those fundamental differences, the courts below correctly found that Virginia's law was not "comparable" to Section 309(g) of the Clean Water Act, and therefore held that federal enforcement was not precluded under Section 309(g)(6)(A)(ii). See Pet. App. 13a-14a, 104a-111a. Contrary to petitioners' suggestion, the court of appeals did not "effectively embrace[]" the requirement that "state law must 'mimic' federal law" in order to preclude enforcement of the CWA. Pet. 19. The court of appeals' decision neither states nor implies such a requirement. The court of appeals simply agreed with the district court's sound conclusion that "Virginia's entire enforcement scheme is not comparable to Section 309(g)" for two quite fundamental reasons: The Virginia scheme "does not provide authority to issue administrative penalties," and "it failed, at the time of the Special Orders, to provide adequate procedures for public participation." Pet. App. 111a.

Petitioners are also mistaken in contending (Pet. 19-23) that the court of appeals' application of Section

309(g)(6)(A)(ii) conflicts with decisions of the First and Eighth Circuits. In each of the cases petitioners cite, the state programs at issue differed in fundamental ways from Virginia's program. For example, the First Circuit concluded in *North & South Rivers Watershed Ass'n* v. *Town of Scituate*, 949 F.2d 552, 554 (1991), that a Massachusetts law providing for nonconsensual assessment of administrative penalties and providing for public participation in the penalty assessment process "closely parallels" the Clean Water Act's administrative penalty program. See Mass. Gen. Laws ch. 21A, § 16 (1996). Similarly, the Eighth Circuit concluded in *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376, 381 (1994), cert. denied, 513 U.S. 1147 (1995), that an Arkansas statute authorizing administrative penalties of up to $10,000 per day, which was supported by regulations allowing public participation, was comparable to the Clean Water Act's administrative penalty program. See Ark. Code Ann. § 8-4-103(c) (Michie 2000).

The court of appeals and the district court in this case reached a different result than did the First and Eighth Circuits because the Virginia laws at issue here differed in fundamental ways from the Massachusetts and Arkansas laws there at issue. See Pet. App. 104a-109a. Virginia has now revised its laws to expand its administrative penalty authority, to increase public participation in the penalty assessment process, and to make its administrative processes more comparable to those of EPA and other States. See *id.* at 13a nn.2-3. There is accordingly no warrant for this Court to review the "comparability" of Virginia laws that have been substantially revised, that do not reflect Virginia's current

administrative process, and that have no continuing importance beyond the outcome of this particular case.[5]

3. Petitioners also broadly contend that the court of appeals' decision conflicts with the decisions of other courts of appeals "on the notice required before a party may be penalized for violating regulatory standards." Pet. 24-28. No such conflict exists. The Fourth Circuit, like other courts of appeals, acknowledges that "[d]ue process requires that a party must receive fair notice before being deprived of property." *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 224 (1997), cert. denied, 524 U.S. 952 (1998). The courts below properly rejected petitioners' fact-specific claim that they did not receive fair notice of their obligation to comply with their NPDES permit. Pet. App. 15a, 87a-102a.

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[5] Petitioners suggest (Pet. 23-24) that a conflict has developed between the First and Ninth Circuits on the question of whether preclusion under Section 309(g)(6)(A) arises only from a diligently-prosecuted administrative *penalty* action, or whether any administrative compliance actions will suffice if the State has, but does not use, administrative penalty authority comparable to that provided under Section 309(g) of the Clean Water Act. Compare *Citizens for a Better Environment* v. *Union Oil Co. (UNOCAL)*, 83 F.3d 1111, 1118 (9th Cir. 1996) (holding that the "plainest reading of the statutory language" is that only administrative penalty actions preclude civil penalty actions under Section 309(g)), cert. denied, 519 U.S. 1101 (1997), with *Scituate*, 949 F.2d at 556 (holding, on policy grounds, that "[t]he state's decision not to utilize penalty provisions does not alter the comparability of the State Act's statutory scheme to the scheme found in the Federal Act"). The court of appeals in this case did not address that issue in light of its holding that "Virginia's enforcement scheme is not sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent penalty action." Pet. App. 15a-16a. Hence, this case provides no occasion to resolve any conflict that may exist between the First and Ninth Circuit decisions on which petitioners rely.

Petitioners' permit imposed a phosphorus limitation on petitioners with unmistakable clarity. The permit directed petitioners to achieve compliance with the total phosphorus limitations in Part I.C.1 of the permit in accordance with the schedule contained therein. Pet. App. 72a-73a. The permit specifically directed petitioners to:

> (1) "[s]ubmit quarterly progress reports for achievement of final effluent limitations" for phosphorus "[w]ithin 30 days of the effective date of the permit and each calendar quarter thereafter until completion of item #2 below" and
>
> (2) "[a]chieve compliance with final effluent limitations" for phosphorus "[b]y January 4, 1993."

Ibid. Petitioners thus cannot plausibly claim that they lacked fair notice that their permit contained a limit on phosphorus discharges. With equal clarity, the Clean Water Act provides that any person who violates "any permit condition or limitation" implementing, *inter alia*, more stringent state requirements, shall be subject to a civil penalty. 33 U.S.C. 1319(d). See p. 11 note 2, *supra*. Petitioners were therefore on notice that failure to comply with the terms of their NPDES permit could subject them to a federal civil enforcement action and civil penalties.

Petitioners claim that "[t]he Board and [petitioners] agreed to a plan that relieved [petitioners] from meeting that state [phosphorus] limit," thus giving petitioners "every reason to believe" that they were excused from compliance with the phosphorus effluent limitation in their NPDES permit. Pet. 25. Petitioners cannot reasonably claim, however, that their correspondence with the Board relieved them of their obligation

to comply with their NPDES permit. As the courts below comprehensively and correctly explained, neither the correspondence between petitioners and the Board nor the Board's Special Orders modified petitioners' permit or excused petitioners from the legal duty to comply with their permit. See Pet. App. 12a, 15a, 66a-75a, 87a-101a. "The Board's Special Orders or letters dated *before* the issuance of the 1992 Permit cannot logically change the terms of a more recent Permit approved by the Board and the EPA." *Id.* at 96a. If petitioners wished to be excused from the unambiguous terms of the 1992 permit after its issuance, then they should have applied for a modification of the permit terms. See *id.* at 12a, 95a-96a.

The Clean Water Act and its implementing regulations set forth detailed procedures governing modification of a permit, which are applicable to all approved state NPDES permitting programs. See 33 U.S.C. 1342(a) and (b)(1)(C); 40 C.F.R. 122.62, 123.25, 124.5(c)(1), 124.6(e). Petitioners not only had fair notice of their permit obligations; they did not take advantage of the Clean Water Act's prescribed course for seeking modification of those obligations. See Pet. App. 95a-96a.[6] Moreover, petitioners' claim that they lacked notice rests on the specific facts of this case. That

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[6] The Act's procedures for modification of a permit are not mere technicalities; they are essential to the preservation of EPA's oversight role and the public's right to participate in the permitting process. See 33 U.S.C. 1342(a)(5) and (b)(3); *UNOCAL*, 83 F.3d at 1120 (holding that a state order could not modify the permit because it did not comply with the regulations governing the modification of NPDES permits; noting that compliance with procedures is necessary to "ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities").

claim, which has been carefully reviewed and properly rejected by the district court and a unanimous court of appeals, presents no legal issue of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-1760

IN THE

Supreme Court of the United States

SMITHFIELD FOODS, INC.,
SMITHFIELD PACKING COMPANY, INC., AND
GWALTNEY OF SMITHFIELD, LTD.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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12 PP

TABLE OF AUTHORITIES

Page

CASES:

Arkansas Wildlife Fed'n v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 513 U.S. 7147 (1995) 5,6,7

Citizens for a Better Env't-Cal. v. *Union Oil Co. of Cal.*, 83 F.3d 1111 (9th Cir. 1996), *cert. denied*, 519 U.S. 1101 (1997) 7

Gwaltney of Smithfield, Ltd. v. *Chesapeke Bay Found., Inc.*, 484 U.S. 49 (1987)..... 2,3

Harmon Indus., Inc. v. *Browner*, 191 F.3d 894 (8th Cir. 1999) 4

Jones v. *City of Lakeland*, 175 F.3d 410 (6th Cir. 1999), *reh'g en banc granted*, 204 F.3d 680 (1999) 6

North & South Rivers Watershed Ass'n v. *Town of Scituate*, 949 F.2d 552 (1st Cir. 1991)..... 5,6,7

Wheeler v. *Barrera*, 417 U.S. 402 (1974)..... 6

STATUTES:

33 U.S.C. § 1319(g) 5,7

33 U.S.C. § 1319(g)(6)(A)(ii) 3,4,5,7

33 U.S.C. § 1326(a)..... 4

33 U.S.C. § 1370(1)(A) 3

Va. Code § 10.1-1182..... 6

Va. Code § 10.1-1186(5), (10) 6

OTHER:

Webster's Third New International Dictionary (1986) 6

IN THE

Supreme Court of the United States

No. 99-1760

SMITHFIELD FOODS, INC.,
SMITHFIELD PACKING COMPANY, INC., AND
GWALTNEY OF SMITHFIELD, LTD.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

The Government does not deny the regulatory clash between federal and state authorities giving rise to this case: Smithfield spent millions of dollars under a compliance agreement with state authorities charged with primary enforcement of Virginia's more stringent, state effluent limitations contained in a state-issued permit; Smithfield was then hit with this federal penalty action for violating the very state effluent limitations that state authorities had assured Smithfield it had met by agreeing to take corrective action it was not otherwise obligated to take. Nevertheless, the United States asks this Court to dismiss the multiple conflicts engendered by the decision of the Court of Appeals below, overlook the compelling federalism issues raised by this case, and disregard the fact that Smithfield was whipsawed by the conflicting demands of federal and state regulators to the tune

of over $12 million.[1] This Court should grant certiorari to resolve those conflicts, uphold the principles of federalism and comity that Congress specifically sought to promote in enacting the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), and ensure that regulated parties are treated fairly where—as here—federal and state authorities impose inconsistent obligations on parties attempting to comply with the law.

1. The United States refuses to acknowledge the conflict between the decision below and *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). The Government contends that Smithfield's reliance on *Gwaltney* is "misplaced" because the decision "does not address the relationship between federal and state enforcement." Opp. 12, 13. But the Government glibly overlooks the fact that this Court's concern—that a second suit might curtail the primary enforcer's discretion—is equally implicated by a penalty action brought by EPA that would undermine the discretion of a State "to enforce the Act in the public interest" when the State acts—like the Commonwealth here—as the primary enforcer of the CWA. 484 U.S. at 60-61. That is clear from *Gwaltney* itself. *See id.* at 61 ("The same might be said of the discretion of state enforcement authorities."). *Gwaltney* confirms that the right of a State to enforce a standard under the CWA includes the discretion not to seek penalties in order to achieve a more significant environmental objective, and that federal authorities should not be permitted to bring a penalty action that frustrates the ability of a State to achieve precisely the sort of broad remedial action contemplated in *Gwaltney* and secured by the

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[1] The Government highlights the fact that Smithfield admitted to reporting and recordkeeping violations. *See* Opp. 7-8. As the record shows, however, those violations were the work of a single rogue employee, *see* Pet. App. 57a, and they are not implicated by any of the questions presented by this case.

Board here—the complete elimination of Smithfield's discharges into the Pagan River, as well as the removal of the pollutants of the Town of Smithfield and other area residents.[2]

The United States also argues that *Gwaltney* does not foreclose this penalty action because the CWA allows EPA to seek civil penalties for "past violations of a state-issued NPDES permit that imposes more stringent conditions than EPA might require." Opp. 13. Congress, however, *expressly* reserved to the States in Section 510 of the CWA the "right" to "adopt *or enforce*" effluent limitations and standards more stringent than those imposed by federal law. 33 U.S.C. § 1370(1)(A) (emphasis added). As we have explained (Pet. 13-15), this statutory reservation of authority would be meaningless if EPA were permitted to thwart the efforts of a State to enforce its own, more stringent environmental standards in the manner it deems best serves the public interest by seeking penalties that the State has chosen to

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[2] Further attempting to distinguish *Gwaltney*, the United States contends that Smithfield chose to connect to HRSD "for reasons of cost-effectiveness and future flexibility," and not because it was "pressured by the threat of penalties to choose a more expensive treatment method than [it] would otherwise have chosen out of economic self-interest." Opp. 13 n.3. To the contrary, HRSD was not the low-cost compliance solution for Smithfield. The record in fact shows that Smithfield incurred much greater costs by connecting to HRSD than it would have if it had complied through an on-site facility. *See* Trial Tr. 656-657; Def. Ex. 49. But even if connecting to HRSD had been more cost-effective, that option was not available in 1993, the time at which the Unites States contends Smithfield was required to comply. At that time, the only way Smithfield could have complied was through the construction of an on-site facility. Had it done so, Smithfield would have had no reason to incur the additional expense of connecting to HRSD. Securing Smithfield's agreement to (1) connect to HRSD and (2) abandon its judicial challenge to the phosphorous limit—both of which Smithfield was not obligated to do—required the Commonwealth to exercise its discretion in the manner contemplated in *Gwaltney*.

forgo, and *Gwaltney* teaches that federal authorities should not be permitted to do so.

The Government's answer to Section 510—which begins "Except as expressly provided in this chapter"—is that the "except" clause allows EPA to bring suit under its general authority to enforce effluent limitations in NPDES permits that are based on more stringent state standards, regardless of the effect on a State's ability to enforce its own, more stringent standards.[3] *See* Opp. 14. Again, that reading would render Section 510 virtually meaningless. The more sensible reading is that Section 510 allows EPA to interfere with more stringent state standards only where the CWA expressly so provides. This construction—unlike the Government's—squares with other sections of the CWA that expressly authorize EPA to establish and enforce preemptive alternative standards. For example, Section 316 allows EPA to grant a variance from otherwise applicable standards with regard to thermal discharges, *see* 33 U.S.C. § 1326(a), and where such a variance is obtained, a State may not enforce its more stringent standards. Review is thus warranted to ensure that Section 510 is given effect and to protect the right of States to enforce their own, more stringent standards in the manner they deem best.[4]

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[3] Although the United States claims that Smithfield "argue[s] that Section 510 * * * effectively grants the States the exclusive authority to enforce more stringent state law standards," Opp. 14, that is simply not so. Smithfield has never contended that the States have the *exclusive* authority to enforce their own, more stringent standards. Rather, Smithfield argues—based on the plain language of the statute—that Section 510 merely precludes EPA from taking any action that interferes with a State's ability to enforce such standards in the manner it deems most beneficial to the public interest.

[4] The United States asserts that the Eighth Circuit's decision in *Harmon Industries, Inc.* v. *Browner*, 191 F.3d 894 (8th Cir. 1999)—in which the court refused to permit a federal overfile action, reasoning that such actions would undermine the efforts of the States to negotiate with

2. The United States also refuses to acknowledge the conflict that exists between the decision of the Court of Appeals below and those of the First and Eighth Circuits in *North & South Rivers Watershed Ass'n* v. *Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991), and *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376, 381 (8th Cir. 1994), *cert. denied*, 513 U.S. 7147 (1995), on the preclusive effect of Section 309(g)(6)(A)(ii) of the CWA. As we explained (Pet. 18-19), the Fourth Circuit below engaged in an exceedingly narrow reading of that provision by effectively insisting that state law "mimic" federal law to trigger preclusion.[5] The First and Eighth Circuits, by contrast, have deliberately eschewed such a restrictive application of Section 309(g)(6)(A)(ii). *See Town of Scituate*, 949 F.2d at 556 (rejecting a "narrow reading" of the provision); *Arkansas Wildlife Fed'n*, 29 F.3d at 381 (state law need not be "identical" to federal law). Rather than insist on exact equivalency between state and federal law, those courts have assessed comparability by looking to the "overall [state] regulatory scheme," and considering whether state and federal law share the "same overall enforcement goals." *Arkansas Wildlife Fed'n*, 29 F.3d at 381; *accord Town of Scituate*, 949 F.2d at

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regulated entities—is not relevant here because *Harmon* involved a different statute and the CWA "contains different and additional language expressly stating that state NPDES programs under the [CWA] do *not* preempt federal enforcement." Opp. 14-15 n.4 (emphasis in original). As we have explained (Pet. 16 n.8), however, the United States' authority to overfile under the CWA is not boundless.

[5] The United States contends that the Court of Appeals did not effectively embrace such a requirement, claiming that its decision "neither states nor implies such a requirement." Opp. 16. But in rejecting the application of Section 309(g)(6)(A)(ii) even though Virginia law at all relevant times provided—like Section 309(g)—for substantial penalties for violations of state permits and significant opportunities for public participation, the Fourth Circuit did precisely that.

556.[6] Under that approach, Virginia's "overall regulatory scheme" is "sufficiently comparable" to federal law. 29 F.3d at 381. *See* Pet. 22-23.

Attempting to sidestep this fundamental conflict, the United States focuses on the differences between Virginia law and the Massachusetts and Arkansas statutes that were at issue in *Town of Scituate* and *Arkansas Wildlife Federation*. Those differences are not only immaterial, but beside the point.[7] Both the First and Eighth Circuits recognized that "comparable" does *not* mean "identical."[8] The Fourth Circuit effec-

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[6] Expressly relying on *Town of Scituate* and *Arkansas Wildlife Federation*, the Sixth Circuit has followed the same approach as the First and Eighth Circuits. *See Jones* v. *City of Lakeland*, 175 F.3d 410, 415 (6th Cir. 1999) (rejecting "a narrow, exacting interpretation of the word 'comparable' that requires one-for-one equivalency"), *reh'g en banc granted*, 204 F.3d 680 (1999). *See also* Pet. 21-22 n.11.

[7] The United States argues that Virginia law differs from the Massachusetts statute because that statute "provid[ed] for nonconsensual assessment of administrative penalties and * * * for public participation in the penalty assessment process," and from the Arkansas statute because that statute "authoriz[ed] administrative penalties of up to $10,000 per day, * * * supported by regulations allowing public participation." Opp. 17. At all relevant times, however, Virginia law provided for public participation in the enforcement process, just like the Massachusetts and Arkansas statutes. *See* Pet. 18. Similarly, at all relevant times, Virginia law provided for the imposition of penalties in a manner that achieved the same ends as those statutes. *See* Pet. 17-18. Indeed, in April 1996—while the Board was still conducting its administrative action and before EPA filed its penalty action—Virginia law was amended to provide for the imposition of administrative penalties without consent. *See* Va. Code §§ 10.1-1182, 10.1-1186(5), (10).

[8] As discussed in the petition (pp. 19-20), this interpretation squares with the plain meaning of the statute, *see Webster's Third New International Dictionary* 461 (1986) ("comparable" means "having *enough* like characteristics or qualities to make comparison appropriate," or "permitting or inviting comparison *often in one or two salient points only*") (emphases added), as well as with this Court's understanding of the term "comparable." *See Wheeler* v. *Barrera*, 417 U.S. 402, 420 (1974)

tively held the opposite. Thus, while Virginia law is sufficiently comparable to Section 309(g) under the approach taken by the First and Eighth Circuits, it flunks under the Fourth Circuit's approach.

The United States likewise attempts to deny the circuit conflict on the scope of Section 309(g)(6)(A)(ii), and that the decision below deepens that conflict. Opp. 18 n.5. That a conflict exists between the First and Eighth Circuits, on the one hand, and the Ninth Circuit, on the other, cannot be seriously disputed. In ruling on the scope of Section 309(g)(6)(A)(ii), the Ninth Circuit expressly rejected the First Circuit's reasoning in *Town of Scituate*—on which the Eighth Circuit expressly relied in *Arkansas Wildlife Federation*—and gave that provision an extremely narrow reading. *See Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1117-18 (9th Cir. 1996), *cert. denied*, 519 U.S. 1101 (1997). Indeed, numerous commentators have recognized the conflict and called for its resolution. *See* Pet. 23. By similarly giving Section 309(g)(6)(A)(ii) an overly restrictive reading in contrast to the First and Eighth Circuits, the decision below intensifies that conflict. This Court should grant review not only to resolve it, but to ensure that Section 309(g)(6)(A)(ii) is given effect according to its terms.[9]

("'comparable' * * * does not mean 'identical'"). The United States does not deny that the Fourth Circuit's approach conflicts with the plain meaning of the statute.

[9] The United States suggests that review is not warranted because Virginia has revised its laws to expand its authority to administer penalties and to provide further opportunities for public participation. *See* Opp. 17-18. But despite such revisions Virginia law still does not "mimic" federal law, as the Fourth Circuit requires. The decision below will thus have a continuing effect beyond this case. Moreover, comparability under Section 309(g) should be gauged at the time the federal penalty action is filed. *See* Pet. 18 n.9.

3. The United States also asserts that "[n]o * * * conflict exists" between the Fourth Circuit's decision and those of other federal courts of appeal on the notice required before a party may be penalized for violating regulatory standards. *See* Opp. 18. As we explained (Pet. 26-27), the Fourth Circuit's decision concluding that Smithfield had fair notice that it was violating the CWA—even though state and federal authorities clearly disagreed over whether Smithfield was in compliance with the state limitations contained in Smithfield's permit and Smithfield relied on assurances from the primary regulating authority that it would be in compliance by investing millions of dollars in taking extreme corrective action—squarely conflicts with decisions of the D.C., Ninth, Tenth, and Fifth Circuits holding that parties lacked fair notice where authorities differed on whether certain conduct was prohibited or required, as well as with the position of the Sixth Circuit on whether a party lacks fair warning of what is required where "common understanding" is otherwise.

The Government does not even attempt to address any of these decisions, and argues instead that because Smithfield's permit contained a phosphorous limitation and the CWA provides for civil penalties for permit violations, Smithfield was "on notice that failure to comply with the terms of [its] NPDES permit could subject [it] to a federal civil enforcement action and civil penalties." Opp. 19. But that argument ignores the fact that Smithfield specifically sought and obtained assurances from the Board that it *would be in compliance* with the state limits in its state-issued permit so long as it connected to HRSD within the requisite timeframe, and that Smithfield was aware that EPA *knew* of its agreement and correspondence with Virginia regulatory authorities, yet did nothing for five years before suing Smithfield for failing to meet the very limits the Board had assured Smithfield it need not meet during the interim. If anything, the absence of fair notice in this case is even more egregious than in the other decisions the Government fails to confront.

The Government's assertion (Opp. 20) that the Special Orders did not modify Smithfield's permit is flatly contradicted by the Board's assurance that "[a]ny special order agreements relative to compliance * * * that have been approved by the Board take precedence over the VPDES permit," 4th Cir. J.A. 86, and rests on the same flawed reasoning of the Fourth Circuit below: that "[t]he Board's Special Orders or letters dated *before* the issuance of the 1992 Permit cannot logically change the terms of a more recent Permit approved by the Board and the EPA." Pet. App. 96a (emphasis in original). Both the Government and the Fourth Circuit overlook the fact that Smithfield sought assurance from the Board *after* it received a draft permit that carried forward the standards in its 1990 permit. In response, the Board gave Smithfield the requested assurance—in writing. The permit maintained the phosphorous and other state limits, as well as compliance dates, to provide a point of reference in the event Smithfield failed to connect to HRSD in accordance with its agreement with the Board—an agreement reflected in the 1991 Special Order, which "[took] precedence" over that permit. *Id.*[10]

In a final attempt to avoid review, the United States asserts that Smithfield's fair notice claim "rests on the specific facts of this case" and "presents no legal issue of general importance warranting this Court's review." Opp. 20-21. To the contrary, as we have noted (Pet. 28), this case has vast implications for myriad regulated entities which now potentially face inconsistent obligations of the sort to which Smithfield was subjected as a result of the decision below.

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[10] The Government, like the Fourth Circuit, also overlooks the fact that in 1994—well *after* the 1992 Permit was issued—the 1991 Special Order was amended to provide that Smithfield "may achieve compliance with the [other state law effluent limitations contained in the 1992 Permit] by connecting to the HRSD system." 4th Cir. J.A. 166.

This Court should grant review to decide the important questions raised in the petition.

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For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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